MOGHA'S

Law of Pleadings in India

WITH PRECEDENTS

Sixteenth Edition

S.A. Kader
G.C. Mogha

Eastern Law House

THE LAW OF PLEADINGS IN INDIA

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Calcutta
Eastern Law House Private Ltd.
54 Ganesh Chunder Avenue
Calcutta 700 013

Delhi
Eastern Law House Private Ltd.
36 Netaji Subhash Marg, Daryaganj
New Delhi 110 002

Singapore, Malaysia, Indonesia and Brunei
Malayan Law Journal Pte Ltd.
3 Shenton Way 14-02/14-05
Shenton House
Singapore 0106

The Law of Pleadings in India

WITH PRECEDENTS

by

P.C. MOGHA, B.A., LL.B.

Late Chief Justice Vindhya Pradesh, Rewa, Law and Revenue Minister, Jammu & Kashmir State, Formerly Legal Rememberancer and Secretary to Government, U.P. Judicial and Legislative Departments, Government Conveyancer, member of the U.P. Legislative Council, and member of the Faculty of Law of the Agra University and Author of the Indian Conveyancer.

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S.A. Kader

Former Judge, Madras High Court

G.C. Mogha

Former District & Sessions Judge

CALCUTTA NEW DELHI

EASTERN LAW HOUSE

EASTERN LAW HOUSE PRIVATE LTD.
54 Ganesh Chunder Avenue
Calcutta 700 013
Tel. (033) 2237-4989/2301
Fax (033) 2215-0491

First Edition	1926
Second Edition	1927
Third Edition	1929
Fourth Edition	1931
Fifth Edition	1936
Sixth Edition	1940
Seventh Edition	1948
Eighth Edition	1951
Ninth Edition	1955
Tenth Edition	1961
Eleventh Edition	1967
Twelfth Edition	1974
Thirteenth Edition	1983
Fourteenth Edition	1987
Fifteenth Edition	1998
Sixteenth Edition	2002
Reprint	2003

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2002

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ISBN 81-7177-088-6

PUBLISHED BY R.C. MOGHA FOR SWARAJ PUBLICATIONS
(A DIVISION OF SWARAJ MOGHA PVT. LTD.), NEW DELHI
AND PRINTED AT KHURANA ENTERPRISES, DELHI

LATE SRI P. C. MOGHA

INTRODUCTION

HIGH COURT
Allahabad
January 20, 1926

DEAR MR. MOGHA,

I promised that I would write an introduction to your book. I am sending it to you in the form of a letter because in it I can tell you more directly and intimately how heartily I congratulate you on the happy thought which caused you to commence this work and the industry which enabled you to carry it through. A lawyer coming to this country finds at least a sufficiency of books on general law and on its special branches, but until recently at least no work on pleadings of an authority was in existence. I am specially glad to notice the ability and knowledge you have brought to bear on this most important subject. In my opinion a knowledge of the science of pleading is the essential equipment of any man who desires to make headway in his profession and ignorance of it is a daily impediment. I could give no better advice to any one than to study again and again the precedents, principles and authorities which are to be found in your book. I confess that when I came here in 1919 nothing shocked me more than the abusive, irrelevant, reckless statements in pleadings and the failure of Subordinate Judges to exercise any control over them, by striking out irrelevant passages and demanding particulars so as to keep the evidence at the trial within proper limits and to prevent surprise. The position is getting better and lawyers are realising that unfounded charges of fraud, reckless justifications, failure to give particulars, intentional mis-statement and other patent defects of pleading do injury to their clients and to their own reputation.

I hope your book will have the success that it deserves, and that it will be studied by the members of the profession, judges and practitioner alike.

Again I congratulate you heartily upon the completion of your task.

Your Sincerely

GRIMWOOD MEARS

To

P.C.MOGHA Esq.

Subordinate Judge

PREFACE TO THE FIRST EDITION

The plaints and written statements which have been coming before me during the course of my judicial work have always struck me as singularly lacking in precision and conciseness, the two most important essentials of a good pleading. I have very often attempted to effect an improvement by freely returning pleadings for amendment and by making the party at fault pay heavy costs. But I could not achieve the desired success, partly because I could not bestow so much time to this work as I wanted, but more so, because no improvement is possible unless the bar makes a real and earnest endeavour. The apathy of the members of the bar is due not so much to natural conservatism as to the want of a clear knowledge of the correct principles of pleading, due to want of training. The subject is not taught in our law colleges, and also there is a singular absence of a book on pleadings in this country. Certain forms of pleadings were introduced in the Code of Civil Procedure of 1908, but, with the exception of a few forms of plaints in mortgage suits, they have never been followed. Even these forms do not supply the real want, because, in the first place, many of them are defective and offend against the elementary rules of pleading, and secondly, they cannot be appreciated until the principles of pleading are correctly understood. The Civil Justice Committee also noticed this state of affairs in their report and threw out a suggestion to the legal profession for the preparation of a standard book on pleadings on the lines of the English work by Bullen and Leake.

As I was interested in this subject, I at once took up the suggestion. I received great encouragement from the Hon'ble Sir Grimwood Mears in my undertaking, and his kind appreciation of the work and encouragement alone have enabled me to carry it through and to present it to the profession in the form of this book.

As a thorough grasp of the principles is essential before a lawyer can drive the fullest benefit by a reading of the precedents, I realized that a book written entirely on the lines of Bullen and Leake and

containing a sketchy summary of the principles will only serve half its purpose. I have, therefore, devoted sixteen chapters of this book to a full and exhaustive discussion of the principles of pleading and almost all the case-law on the subject has been digested in them. The portions of the Code of Civil Procedure which relate to pleadings, plaints, written statements, etc., have been incorporated in these chapters, so that there should be no necessity to refer to any other book on a point of pleading. A chapter on appeals, and another on applications and affidavits has also been added, and, it is hoped, will be found useful in every day practice.

In Part II, I have given precedents for different kinds of suits which ordinarily come before the civil courts in this country. I have arranged them, for convenience of reference, in alphabetical order according to the various subjects. Explanatory footnotes have also been appended to the precedents. They will be particularly useful for a thorough understanding of the essential requisites of pleadings, in a particular class of cases, and an intelligent study of these notes will enable a pleader to modify the precedents according to his own needs. The exact nature of a particular kind of suit, what should be alleged and proved in such a suit, what possible defences can be raised, and all important points of procedure and practice, have been discussed in these notes. Important questions of court-fees, valuation and limitation have also been touched upon.

As the drafting of petitions and affidavits is as important as that of plaints and written statements, I have also given precedents of all important applications under the Code of Civil Procedure and other Acts of daily use in civil courts.

I have thus spared no pains in making the book really useful for the practitioners, and I hope that if the principles of pleading are fully and intelligently studied and followed, there will be substantial improvement in the pleading in mofussil courts.

I must take this opprotunity of most respectfully expressing my sense of immense gratitude to the Hon'ble Sir Grimwood Mears for the introduction and for all the encouragement and help he has so kindly given me. He has taken a great interest in this work and has, in some instances, made valuable suggestions with regard to the form of precedents.

My thanks are also due to Messrs. Suresh Chandra Chaturvedi and Randhir Singh, Munsifs, for having kindly assisted me in going through the proofs.

P.C.MOGHA

Muzaffarnagar
January 23, 1926

PREFACE TO THE SIXTEENTH EDITION

It has given me great pleasure in revising the celebrated work of Shri P.C. Mogha which has held a pre-eminent position on the subject of Pleadings for over seventy five years and undergone fifteen editions so far. It is the book of reference found on the table of every lawyer practising on the Civil Side.

The present edition has undergone a thorough revision and incorporates several other kinds of Suits, Fundamental Principles of Substantive law relating thereto, more Model Forms under the existing heads and under the Administrative Tribunals Act, The Recovery of Debts due to Financial Institutions Act and The Consumer Protection Act and case laws upto date.

My thanks are due to Mr. M. I. Meerasahib and Mr. M. Imtiaz, advocates, High Court Madras for their assistance, to my stenographer Mr. Srinivasan and M/s Kraftworx Communications (P) Ltd.

I wish and hope that this revised edition will be as useful to the Bar and the Bench as its predecessors.

S. A. KADER

Chennai
January 10, 2002

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PART I
PRINCIPLES OF PLEADINGS

Chapter I

PLEADINGS GENERALLY

Pleadings are statements in writing drawn up and filed by each party to a case, stating what his contentions will be at the trial[1] and giving all such details as his opponent needs to know in order to prepare his case in answer.

GENERAL : The drafting of pleadings is an art. It demands a high degree of professional skill and professional knowledge, expertise and experience. It is not a child's play as some young members of the Bar fancy. Various works on pleadings and the formats framed by the authors and the forms annexed to the Code of Civil Procedure and other enactments are only a guide and it is for the lawyer who owes a duty to both the profession and the court to see that the pleadings are properly framed. The function of pleadings is not simply for the benefit of the parties, but also and perhaps primarily for the assistance of the court by defining with precision the area beyond which, without the leave of the court and consequential amendment of the pleadings, the conflict must not be allowed to extend.[2] While a lawyer is entitled to set out the case of his client clearly and firmly he must not forget his duty to the profession to which he belongs and throw away the noble traditions of the Bar and use intemperate or vituperative epithets or make scandalous, frivolous or vexatious allegations against the opponents. Not infrequently such allegations land the counsel himself in trouble. The typical instance is the use of the word '*awara*' (vagabond) against the plaintiff's son in the written statement has led to series of litigations involving the counsel for the defendant.[3] Moderation in language is the hallmark of proper pleadings.

The court is not expected to be a mute spectator to the pleadings raised by the parties. It is the duty of the court to peruse the pleadings atleast at the time of framing of the issues and strike out matters which are unnecessary, scandalous, frivolous or vexatious, or which may tend to prejudice, embarrass or delay the fair trial of the suit or which is otherwise

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1 C.P.C. uses the word "hearing" for what in England is called "trial".

2 *Pinson* v. *Lloyds & National Provincial Foreign Bank Ltd.*, 1941 - 2K.B. 72

3 *Sumant Prasad* v. *Ram Sarap*, A 1946 All 204.

an abuse of the process of the court (O.6, R.16). At the same time the court should realise that the rules of the procedure of which pleadings form but a part are matters of mere machinery for rendering justice. Its approach should be pragmatic and not highly technical.[4]

It must be borne in mind that the rules of pleadings are intended to regulate the business and procedures of the court. They never create new legal rights where none exist, nor do they take away the existing rights. The Code of Civil Procedure is only an adjective law as opposed to substantive law, on the basis of which alone the rights of a party are to be determined. The primary duty of the lawyer is first to make himself familiar with the substantive law on the subject on hand, statutory, customary and judicial precedents up-to-date, to find out the correct position of law on the matter in question, to ascertain where his client stands and then shape the pleadings according to law to the best advantage of his client. This is much more important in the case of budding lawyers, many of whom have not even taken the apprentice course under seniors. A lawyer true to his profession must have the mental stamina and intellectual honesty to lay bare before his client the correct legal position, inform him in appropriate cases of the futility or frailty of his case and advise him accordingly. An honest lawyer who gives an honest opinion at the risk of losing his brief is bound, in the long run to earn the confidence of the litigant public.

It is the first and foremost duty of a lawyer briefed to file a suit to consider whether the subject matter of the suit is of a civil nature and is maintainable in the regular court of civil jurisdiction. Section 9 of the Code of Civil Procedure lays down that Courts shall subject to the provisions herein contained have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. If a civil court has no jurisdiction to try the case it goes to the very root of jurisdiction and it is a case of inherent lack of jurisdiction.[5]

We may classify pleadings under four broad heads:

I. Pleadings in a suit

4 *Prakash Chandra* v. *Commissioner & Secretary, Govt of India*, A 1986 SC 687; *CST* v. *Auriya Chamber of Commerce*, A 1986 SC 1556; *Sheik Abdul Satar* v. *Union of India*, A 1970 SC 479.

5 *Hiralal* v. *Kalinath*, A 1962 SC 199.

II. Pleadings in other civil proceedings before a court or tribunal.

III. Pleadings in writ proceedings.

IV. Pleadings in an election petition.

I. Pleadings in a suit

Plaint and written statement : As a rule, there are only two pleadings in a suit, viz :

(*a*) A statement of claim, called the "Plaint", in which the plaintiff sets out his cause of action with all necessary particulars;

(*b*) A defence, called the "Written Statement", in which the defendant deals with every material fact alleged by the plaintiff in the plaint and states any new facts which tell in his favour, adding such legal objections as he wishes to take to the claim.

Replication: No pleading subsequent to the written statement of a defendant, other than by way of a defence to a set off or counter-claim can be presented except by leave of the court and upon such terms as the court thinks fit, but the court may at any time require a written statement or additional written statement from any of the parties.[6] Such leave is normally given to a party whose opponent has been permitted to amend his pleading. Such subsequent written statement is normally called, in the case of plaintiff, Replication or Rejoinder and in the case of a defendant, an Additional Written Statement. It is for this reason that "pleading" is shortly defined in the Code of Civil Procedure as meaning a plaint or a written statement.[7] In view of the language of O.8, R.9, the expression "written statement" comprises a Replication as well. Annexures to a plaint or written statement, referred to in some paragraphs of such pleading are deemed parts of the pleading.[8]

Set-off and Counter-claim : In his written statement the defendant is expected to put forward his defence to the plaintiff's claim and the grounds on which he wishes to defeat it. If he wants to put forward his own claims against the plaintiff, such claims can be of two kinds: those which strictly fall within the category of set-off provided for in O.8, R.6,

6 O.8, R.9.

7 O.6, R.1.

8 In re *Pandam Tea Co.*, 1972 Tax LR 1923 Cal, 45 Comp. Case 67.

and those which do not fall within that class. Claims of the former kind can be pleaded in the written statement and will be entertained by way of set-off. Claims of the latter kind are known as counter-claims. O.8, R.6A, as added by Central Act, 1976, now, makes a specific provision for counter-claim. Like set-off, counter-claim is not limited to money claims alone. A set off is essentially a ground of defence but a counter-claim could arise only if the defendant could have filed an independent suit in respect of the same.[9] In other words it is a weapon of offence which enables a defendant to enforce a claim against the plaintiff as effectually as in an independent action.[10]

Pre-trial procedure, Oral Pleadings : If, however, facts alleged in the written pleadings of one party are not, expressly or by necessary implication, admitted or denied by the other party, the judge is expected, at the first hearing of the suit (and before the settlement of issues), to ascertain from the latter whether he admits or denies them and to record such admissions or denials.[11] The statements so recorded may be called *oral pleadings*. This is all the more necessary when the defendant has not filed a written statement, and also, when some new facts are alleged in the written statement, in which case the issues cannot be settled unless it is ascertained whether the plaintiff admits or denies them. It is also necessary when the written pleadings are incomplete,vague, ambivalent or imprecise. An alert Judge is the answer to irresponsible or careless pleadings. The trial courts should insist imperatively on examining the party at the first hearing so that bogus claims and defences can be curtailed at the earliest stage.[12]

Pleadings, therefore, also include statements of parties or counsel, recorded before the framing of issues for clarification of the points in dispute.[13] These statements are in the nature of supplementary pleadings and no plea inconsistent with them can be raised at later stage, except,

9 *T.A.M. Subramaniam Chettiar* v. *K.M. Shaningham*, (1966) 1 MLJ 200.

10 *Saraswati Oil Mills* v. *State of Gujarat*, (1967) 18 STC 163 (SC) (citing Halsbury's Law of England on distinction between set-off and counter-claim).

11 O.10. R.1.

12 *T. Aruvindam* v. *T.V. Satyapal*, A 1977 SC 2421.

13 *Ganga Ram* v. *Gyan Singh & Co.*, A 1960 Punjab 209.

by way of amendment of pleadings.[14] Issues can be framed on such supplementary pleadings and the trial is not vitiated if no formal amendment is made in the written pleadings in the light of oral pleadings.[15] It is, however, desirable for the party concerned to seek leave of the court to amend its pleadings if the facts orally stated appear to be at variance with the pleadings or are so material as ought to have been mentioned in the pleadings, for such oral statements are no substitute for pleadings.[16] Statements made under O.10, R.1, being part of pleadings are binding on the party making it and cannot be rebutted by it. However, statements made under O.10, R.2 are not always conclusive and the court may in a suitable case allow the party making it to show that the admission was incorrect and was made under some misapprehension or inadvertence.[17]

Every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted, except, as against a person under disability.[18] Likewise where the defendant has not filed a pleading, it shall be lawful for the court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability; but the court may, in its discretion, require any such fact to be proved.[19] Normally, a fact which is taken to be admitted need not be proved,[20] but the court has been given discretion in the interest of justice to require any fact so taken to be admitted, to be proved otherwise than by such admission[1] and in exercising this discretion it is required to have regard to the fact whether the defendant could have, or has, engaged a pleader.[2]

14 *Mohammad Yahya* v. *Rahem Ali*, 117 IC 813, A 1929 Lah 165.
15 *Firm of Suraj Singh* v. *Sardar*, 116 IC 884.
16 *Quazi Toufiqur Rehman* v. *Mst. Nurbanu Bibi*, A 1976 Gau 39.
17 *Balmiki Singh* v. *Mathura Prasad*, A 1968 All 259 (case law discussed); See also, *Kailash Chandra* v. *Ratan Prakash*, A 1974 All. 138.
18 O.8, R.5 (1)
19 O.8, R.5 (2).
20 *Jagannath Upadhya* v. *Amrendra Nath Banerjee*, A 1957 Cal 479.
1 O.8, R.5 (3), as amended by 104 Act of 1976.
2 The expression 'pleader' includes an advocate, a *vakil* or an attorney of a High Court, vide sec. 2 (15).

Pleadings in India: In our country pleadings used to be extremely lax and most inartistically drawn up. They were neither concise nor precise, and contained vague, irrelevant and general statements, from which it was difficult to ascertain the question actually in controversy. This was realised by the Legislature in 1908, and in the Code of Civil Procedure, enacted in that year, a few rules of pleadings were added, based on the English rules of pleading. These rules are contained in Order 6 and 8 of the Code. But, inspite of the fact that these rules have been on the statute book for so many years, there continues to be considerable scope for improvement in pleadings generally.[3]

Object of Pleadings : The whole object of pleading is to give fair notice to each party of what the opponent's case is,[4] and to ascertain, with precision, the points on which the parties agree and those on which they differ, and thus to bring the parties to a definite issue. The purpose of pleading is also to eradicate irrelevancy. In order to have a fair trial it is imperative that the party should state the essential facts so that other party may not be taken by surprise.[5] The parties thus themselves know what are matters left in dispute and what facts they have to prove at the trial and are thus given an opportunity to bring forward such evidence as may be appropriate.[6] They are saved the expense and trouble of calling evidence which may prove unnecessary in view of the admissions of the opposite party. And further, by knowing before hand, what points the opposite party will raise at the trial, they are prepared to meet them and are not taken by surprise as they would have been, had there been no rules of pleadings to compel the parties to lay bare their cases before the opposite party prior to the commencement of the actual trial.[7] The main object of

3 *Prabodh Verma* v. *State of U.P.*, (1984) 4 SCC 251 (para 38).

4 *Someshwar* v. *Tribhuwan*, A 1934 PC 130, 149 IC 480; *Ram Sarup Gupta* v. *Bishun Narain Inter College*, A 1987 SC 1242; *Narinder Nath* v. *Jaswant Singh*, A 1994 P & H 111; *Ganesh Trading Co.* v. *Mogi Ram*, A 1978 SC 484.

5 *Ram Sarup Gupta* v. *Bishun Narain Inter College*, A 1987 SC 1242; *K. Karunakarathnam* v. *A. Perumal*, A 1994 Mad 247 (DB); *Ram Kishan* v. *Mast Ram*, A 1986 P & H 61 (DB).

6 *Sayad Muhammad* v. *Fatteh Md.*, (1895) 22 IA 4, 22 C 324 (PC); *Lakshmi Narain* v. *State*, A 1977 Pat 73; *Elizabeth* v. *Saramma*, 1984 Kar LT 604.

7 *Sayad Muhammad* v. *Fatteh Md.*, (1895) 22 IA 4, 22 C 324 (PC); *Thorp* v. *Holdsworth*, (1876) 3 Ch D 637.

pleadings is to find out and narrow down the controversy between the parties.[8] Contentions which are not based on the pleadings cannot be permitted to be raised either at the trial stage or at the appellate stage.[9] It is also well-settled that notwithstanding the absence of pleading before a court or authority, still if an issue is framed and the parties were conscious of it and went to trial on that issue and adduced evidence or cross examined witnesses in relation to the said issue, no objection as to want of pleading can be permitted to be raised later.[10]

Construction of Pleadings : It is well settled that in the absence of pleadings, evidence if any produced by the parties cannot be considered and no party should be permitted to travel beyond its pleadings and all necessary and material facts should be pleaded by the party in support of the case set up by it.[11] Where a claim has never been made in the defence presented, no amount of evidence can be looked into upon a plea, which was never put forward.[12] No evidence can be led on a fact not pleaded.[13] It is also not open to the parties to give up the case set out in the pleadings and propound a new and different case.[14] Evidence on a matter which is not acutally in issue cannot be looked into. Where the parties go to trial knowing fully well what they are required to prove, adduce evidence and the court considers the same, the parties cannot have grouse that the evidence should not be looked into in the absence of proper pleading or issue for determination.[15]

8 *Kishan Lal Gupta* v. *Dujodwala Industries*, A 1977 Delhi 49, (1976) 78 PLR (Delhi) 227.

9 *D. Kedari* v. *Hazurabad Co-operative Marketing Society Ltd.*, 1994(2) ALT 539 AP (DB).

10 *Sardul Singh* v. *Pritam Singh*, 1999 (3) LW 466 SC.

11 *Ram Sarup Gupta* v. *Bishun Narain Inter College*, A 1987 SC 1242; *K. Kanukarathnam* v. *A. Perumal*, A 1994 Mad 247 (DB).

12 *Siddik Mohd. Shah* v. *Mt. Saran*, A 1939 PC 57; *Hari Chand* v. *Daulat Ram*, A 1987 SC 94; *Shri Venkataramana Devaru* v. *State of Mysore*, A 1958 SC 255; *S. Venkappa Devadiga* v. *Smt. R.S. Devadiga*, (1977) 3 SCC 532, A 1977 SC 890; *Shankar Chakravarti* v. *Britania Biscuits Co.*, A 1979 SC 1652, (1979) 3 SCC 371 (para 32); *Kupala Obul Reddy* v. *Narayana Reddy*, (1984) 3 SCC 447 (para 15) (also see Chapter VIII, *post*).

13 *Harichand* v. *Daulat Ram*, A 1987 SC 94.

14 *Vinod Kumar* v. *Surjit Kaur*, A 1987 SC 2179 at p.2183.

15 *Kali Prasad* v. *Bharat Cooking Coal Ltd.*, A 1989 SC 1530; *Kunju Kesavan* v.

However, a mere inaccuracy in stating the date of cause of action has been held not to justify dismissal of the suit.[16] In a case for damages for failure to take delivery by the buyer, want of clear averment in the plaint about the seller's readiness and willingness to deliver has not been considered fatal.[17] But in a suit for specific performance of a contract the averment of continuous readiness and willingness is essential[18] under section 16(c) of the Specific Relief Act, 1963. Such averment may not, however, be necessary in a case where the defendant had repudiated the contract.[19] Moreover, readiness and willingness cannot be treated as a strait jacket formula and these have to be determined from the entirety of facts and circumstances relevant to the intention and conduct of party concerned.[20] The averment that the plaintiff has no objection to perform the contract in accordance with the decision of the court is a sufficient averment as contemplated in section16(c) of the Specific Relief Act.

In a motor accident claim case the court upheld the claim on the facts alleged and proved even though there was no clear plea of negligence, it was observed that pleadings have to be interpreted not with formalistic rigour but with latitude on awareness of low legal literacy of poor people.[1] When a person relies on a Will and pleads that the Will was executed by the testator, the pleading is to be construed that the Will was executed by the testator in a sound and disposing state of mind.[2]

Pleadings in the mofussil are not so strictly construed as pleadings in the High Court.[3] The Pleadings in mofussil Courts in India are loosely drafted

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M.M. Philip, A 1964 SC 164; *Rajbir Kaur* v. *S. Chokosiri & Co.*, A 1988 SC 1845; *Ram Sarup Gupta* v. *Bishun Narain Inter College*, A 1987 SC 1242.

16 *Abdul Shakur* v. *Rajendra*, A 1935 All 759, 155 IC 1092.

17 *Arjunsa* v. *Mohan Lal*, A 1937 Nag 345.

18 *Ardeshir* v. *Flora Sassoon*, A 1928 PC 208; *Prem Raj* v. *DLF Housing and Construction (Private) Ltd.*, A 1968 SC 1355; *Ouseph Verghese* v. *Joseph Aley*, (1969) 2 SCC 539; *Abdul Khader Rowther* v. *P.K. Sara Bai*, A 1990 SC 682.

19 *International Controls* v. *R.K. Suri*, A 1962 SC 77.

20 *Ramesh Chandra Chandick* v. *Chunni Lal Sabbarwal*, A 1971 SC 1238; *Buddhoo Teli* v. *R.S. Tewari*, 1980 All WC 716; *Krishnan Kesavan* v. *Kochukunju Karunakaran*, A 1988 Ker 107.

1 *Manjushi Raka* v. *B.L. Gupta*, A 1977 SC 1158, (1977) 2 SCC 174 .

2 *Chinnamal* v. *Kannagi*, A 1989 Mad 185.

3 *Badat & Co.* v. *East India Trading Co.*, A 1964 SC 538 (para 11) per *Subba Rao*, J.; *Ganesh Sahu* v. *Dwarika*, A 1991 Pat.

and as such a liberal construction has always to be given to such pleadings.[4] The courts would be disposed towards a construction which would permit rather than shut out, an adjudication of the real rights of the parties, when from the facts set out, such adjudication may be held to be justified, though not asked for in specific terms or in strict form.[5] The fairness of trial demands that the opposite party must know the case he has to meet and should not be taken by surprise, but the courts would be slow to throw out a claim on a mere technicality of pleading when the substance of the thing is there and no prejudice is caused to other side. The primary, though not the only, consideration in the construction of pleadings is not so much what a careful draftsman would intend to express if he had used the words in question, nor what meaning the court or the opposite-party ought to have put on those words, but in what sense, as a matter of fact, the words were understood.[6] A liberal construction should, therefore, always be put on pleadings, and the intention of the party pleading should be looked to. The court should look to the substance rather than to the wording of a pleading. Rules of procedure are meant to subserve and not to govern the cause of justice. A document referred to and relied upon in pleadings may be considered to constitute a part of pleadings.[7]

If the substance of the essential material facts for grant of relief is stated in the pleadings, the court should not throw away the same on the ground of defective form or the deficiency in the pleadings.[8] A plaintiff's case should not be defeated merely on the ground of some technical

4 *Laxminarayan Deo-Vasti Temple* v. *Narayan F. Marathe*, 1995 (2) Bom CR 610 (Bom.)

5 *Mahendra Nath* v. *Surajmal*, 45 CWN 17.

6. *Bhagawati Prasad* v. *Chandramaul*, A 1966 SC 735; *Bhim Singh* v. *Kan Singh*, A 1980 SC 727, (1980) 3 SCC 73; *Madan Gopal* v. *Maniraj*, A 1976 SC 461, (1977) 1 SCC 669.

7 *Ram Sarup Gupta* v. *Bishun Narain Inter College*, A 1987 SC 1242; *Ganesh Sahu* v. *Dwarika Sao*, A 1991 Pat 1; *Archana Estate and Construction Pvt. Ltd.* v. *Roshan Lal*,(1995) I Punj LR 301 (P & H) (Technical Rules of Procedure should be applied to serve the ends of justice and should not be made tools of oppression); *Sharda Ram* v. *Malik Yashpal*, (1964) 66 Punj. LR 1126. But see *Niranjan Lal Ratan Kumar* v. *R.S.N. Co.*, A 1967 Assam 74 (contents of protest note referred to in W.S. treated as not pleaded).

8 *Kalawati Tripathi* v. *Damyanti Devi*, A 1993 Pat 1 (DB); *Sayed Ali* v. *Gyarsi Lal*, 1983 MPLJ 389 MP; *Bismilla* v. *Janeshwar Prasad*, A 1990 SC 540.

defect in his pleading, provided he succeeds on the real issues in the case.[9] The pleading has to be read as a whole to ascertain its true import and it is not permissible to pull out a sentence or a passage to read it out of the context, in isolation.[10] Therefore, an erroneous description of the claim is not fatal, and if a claim for money had and received is described as one for damages, the error is not fatal.[11] Similarly, when a plaintiff sued for possession as a proprietor he was given a decree on the finding that he was a service tenure holder.[12] In a suit for debts, a plea that the debts were not binding on the *mutt* property as they were not, and could not have been incurred by the deceased *matadhipati* for the benefit of the *mutt*, was held to include both the legitimacy of the purpose for which the debts were borrowed as well as the necessity to borrow the debts.[13] Relief may sometimes be founded on a plea not directly made but covered by implication. If the plea or ground of defence raises an issue arising out of what is alleged or admitted in the plaint, or is otherwise apparent from the plaint itself, no question of prejudice or surprise to the plaintiff arises.[14] It is necessary that the point was at issue and the parties knew that the plea was involved in the trial. Thus where the plaintiff fails to prove tenancy, a decree for ejectment may be passed on the ground of defendant's possession being by leave and licence.[15] Similarly, where the question is whether a person is sued in a representative capacity or in personal capacity, the mere fact that the cause title does not describe his representative capacity is immaterial, but the whole plaint should be read and the conduct of litigation looked at.[16]

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9 *Dharam Das* v. *Ranchhodji*, 64 IC 517, 23 Bom LR 1009; *Kishori Lal Nag* v. *Tinkari Chandra*, A 1980 Cal 204.

10 *Udhav Singh* v. *Madhav Rao Scindia*, 1977 (1) SCC 511, A 1976 SC 744; Syed *Dastagir* v. *P.R. Gopalakrishna Shetty*, 1966 (6) SCC 3773.

11 *Harpal* v. *Ram Sarup*, 34 IC 173 (All).

12 *Jokhan* v. *Mahesh*, 27 IC 720, 13 ALJ 160.

13 *Lakshmichand* v. *Vibhudapriya Thirtha*, 17 LW 274, 44 MLJ 187, A 1923 Mad 288 (DB).

14 *Udhav Singh* v. *Madhav Rao Scindia*, A 1976 SC 744.

15 *Bhagwati Pd.* v. *Chandra Mau*, A 1966 SC 735, (1966) 2 SCR 286; *Abdul Sami* v. *Md. Noor*, 1965 ALJ 339; *Ram Shanker* v. *Noor Mohd.*, A 1976 All 155; *Pannalal* v. *Sharafat Ali*, 1979 ARC 90; *Kashi* v. *Mujtaba Hasan*, 1982 BLJR 28.

16 *Sonachalam* v. *Kumaravelu*, 54 MLJ 587, A 1928 Mad 445 (DB).

The leniency of the courts in the construction should, however, be no encouragement to pleaders in disregarding rules of pleading.[17] If the rules of pleading which aim at making the trial easier, reasonable cost, and justice to both parties, are construed too strictly the pitfalls of pleading may prevent the merits of the issue from being discussed; if the rules are lightly disregarded, the result may be confused trials, unfair surprise, costly adjournments and many appeals. It is, therefore, necessary to maintain a delicate balance between technicality and regard for the practical issues. It is the right of a party to have the opponent's "case presented in an intelligible form so that he may not be embarrassed in meeting it." An unnecessary pleading "tends to prejudice, embarrass and delay the trial of the action".[18]

Duty of Court : "The responsibility of clearly perceiving and raising points, which arise upon the pleadings and evidence, and the proper adjudication of which is essential for the ends of justice, rests on the court as much as on the parties or their pleaders."[19] This duty is recognised by statute by the enactment of the provisions noticed above, namely, that, at the first hearing, the court shall ascertain from each party whether he admits or denies such allegations of facts as are not expressly or by necessary implication, admitted or denied by him,[1] and a further provision under which the court is empowered to examine the parties before settlement of issues to find out what the actual controversy between them is.[2] Such examination may be made by the court either *suo motu* or on the suggestions of the opposing counsel.[3] When the question is whether a party should be held bound by an admission in his pleadings, it is the duty of the court to look to the pleadings as a whole and not to dissect a fact out of the pleadings.[4] Moreover, the court should not record a concession on behalf

17 *London and Lancashire Co.* v. *Binoy*, A 1945 Cal 218; See also *Attorney General* v. *J.P. Bayly Ltd.*, A 1950 PC 73 (A case from Fiji in which the Privy Council set aside the decree based on a plea not contained in the pleadings but remanded the case to the court below to enable proper amendments being made).

18 *Knowles* v. *Roberts*, (1888) 38 Ch. D. 263 (Bowen, L.J.).

19 *Per* Westropp, C.J., in *Apaya* v. *Rama*, 3 B 210

1 O.10, R.1.

2 O.10, R.2.

3 O.10, R.2.

4 *Shiv Saran Rai* v. *Sukhdeo Rai*, 171 IC 317, A 1937 Pat 418; *Dular Singh* v. *Sitaram*, A 1937 Nag 184.

of a party loosely but should specify as to who made the concession and in what words.[5] Extensive powers have further been given to the courts to strike out pleadings or to order their amendment,[6] and to call for written statements or further written statements.[7] When the pleadings are vague, the court has power also to order further and better particulars.[8] The distinction between material facts and material particulars of facts stated ought not, however, be overlooked.[9] It is duty of the trial court to clarify the pleas contained in a written statement which were too vague and too general to indicate what was meant by the defendant even if no attempts are made by the plaintiff to seek such clarification. Unfortunately, courts do not make so free and extensive use of these powers as is necessary, and the result is that the issues are enlarged and irrelevant evidence is often introduced, the real issues being sometimes lost sight of. If these powers were carefully and extensively exercised, much of the evil effect of bad pleading could be avoided. In fact that is not merely a matter of discretion; it is the duty of the court to find out accurately the real points of controversy between the parties and to adjudicate upon them, and not to pass technical orders on technical points, for that means denial of substantial justice. In England these powers and also the rights of the parties to seek discovery, clarifications and admissions, which are contained in Orders 11 and 12 of our C.P.C., are so extensively and effectively exercised that ninety nine percent cases are settled even before reaching the trial stage.

Courts have no power to non-suit the plaintiff merely because the pleadings are not in proper form.[10] Again, relief is not to be refused merely because the relief claimed is wrongly described[11] or the wrong statute stated.[12] Where a party pleads and proves all necessary facts, it is for the court to draw the legal inferences from them.[13] A party need not plead

5 *Zila Parishad* v. *Ramesh Chandra*, 1978 ALJ 412.
6 O. 6, R.16 and 17.
7 O. 8, R.9.
8 O. 6, R.5.
9 *Moti* v. *Roshan*, A 1971 HP 5; *Mohan Singh* v. *Bhanwar Lal*, A 1964 SC 1366.
10 *Moor*, IA 383, 7 Suth WR 8.
11 *Babu Lal Roy* v. *Bindhyachal Rai*, A 1943 Pat 305.
12 *Muthuswami* v. *Ramalinga*, A 1958 M 366; *Trailakya Nath* v. *Bimala*, ILR (1953) 2 Cal 385.
13 *Somnath Singh* v. *Ambika Dube*, A 1950 All 121.

them. It is for the court itself to find out and examine all pleas of law that may apply to facts.[14] The court can, however, reject a plaint if it does not disclose a cause of action,[15] that is to say, if on the facts pleaded in the plaint no case is made out.

It is also the duty of the judges to see that the rules of pleadings are obeyed in their courts, and especially endeavour to save public time by not allowing counsel to travel "outside the record", that is to say, not to give evidence which goes beyond any of the particulars in the plaint or written statement. Thus, if a plaintiff has given in his particulars of fraud, three distinct grounds, it would be the manifest duty of the court to interpose and exclude any evidence of a fourth ground of which no mention is to be found in the plaint. The decision of a case cannot be based on grounds outside the plea of the parties and it is the case pleaded which has to be proved.[16]

Settlements of Issues : Order 14 deals with the settlement of issues and determination of a suit on issues of law or on issues agreed upon. It is here that the trial court has to take great care and caution. The trial court has to read the plaint and the written statement, if any, and after examination under R.2 of O.10 and after hearing the parties or their pleaders, ascertain the material propositions of fact or of law upon which the parties are at variance and shall then proceed to frame and record the issues. If the trial court spends some useful time while framing the issues, a good deal of unnecessary oral evidence and elaborate arguments may be shut out. Unfortunately, many trial courts never realise the importance of framing issues and very often draft issues furnished by the counsel on both sides are treated as issues framed by the court. This practice has to be deprecated in no uncertain terms.

Duty of Pleader : Though the courts do, for the sake of justice, apply liberal rules of construction to pleadings and though it is the duty of the courts to clear up ambiguous and obscure pleadings and to find out the real points at issue by exercising their various powers in this behalf, yet all

14 *Gulzar Ahmad* v. *Govt. of U.P.*, A 1950 All 212; *Kedarlal Seal* v. *Harilal Seal*, A 1952 SC 47.

15 O.7, R.11 (a).

16 *S. Venkappa Devadiga* v. *R.S. Devadiga*, A 1977 SC 890; *Trojan & Co. Ltd.* v. *Nagappa Chettiar*, A 1953 SC 235; *Raruhu Singh* v. *Achal Singh*, A 1961 SC 1097.

that does not absolve the pleaders from their initial responsibility of drafting clear and correct pleadings. A bad and careless pleading is often apt to spoil the case of a party beyond redemption, and even if the judge is inclined to stretch every point in his favour to rectify the mistake of the pleader, it certainly always involves the client in unnecessary expense, for no substantial amendment can be allowed except on strict terms as to costs or otherwise. It is, therefore, the duty of every pleader to take extreme care in drafting his pleadings. No doubt, he will gain much by experience, but a thorough understanding of the rules of pleading is essential to start with. He should, before proceeding to draft a plaint or a written statement, not only make himself acquainted with all the detailed facts of the case, but should also carefully and thoroughly study the law bearing on the subject, for it does not infrequently happen that, due to want of accurate knowledge of the law, a pleader pleads matters which are wholly unnecessary and thus involves his client in the expense and trouble of proving them, or omits matters which are the essentials of his claim or defence, thus very often making his client lose the case without any fault of his own. The bar will also do well to make increasing resort to the provisions of Orders 11 and 12, for discovery, inspection, etc., with a view to curtailing the area of controversy. These provisions, like those of Order 10, form part of the pre-trial procedure and have not yet been widely used in our country.

Fundamental Rules of Pleadings (summing up) The fundamental rules of pleadings are four, viz.

1. Every pleading must state facts and not law.

2. It must state all the material facts, and material facts only, (O. 6, R.2).

3. It must state only the facts on which the party pleading relies, and not the evidence by which they are to be proved; and,

4. It must state such facts concisely but with precision and certainty.

Each of these rules is so important that is deserves a separate chapter for discussion.

II. Pleadings in other civil proceedings

Because of the proverbial delays in civil suits, Parliament and State Legislatures have been creating special courts and tribunals for speedier disposal of cases of various types. For instance, cases of ejectment in

respect of urban buildings between the landlord and tenant are now dealt with by special tribunals created under various State Legislations. Railway accidents claims are decided by Railway Claim Tribunals. Claims by industrial workmen for payment of wages are entrusted to prescribed authorities. So is the case with the workman's compensation claims. In some states such as U.P. and Rajasthan, Public Services Tribunals have been created for adjudication of cases of public servants in disputes arising out of their employment, including dismissal, termination of service, etc. In such cases normally the party aggrieved is expected to approach such special tribunals and the jurisdiction of the civil court under section 9 C.P.C. is barred. These are only a few of the numerous tribunals so far created by the Legislature. Such tribunals are likely to multiply in future. These tribunals are given various powers of a civil court while trying a suit under C.P.C. though they are not regular civil courts. Very often the presiding officers of these tribunals are presiding officers of regular civil courts, though not necessarily always. The provisions of the C.P.C. do not as such necessarily apply to proceedings before these tribunals although proceedings are civil in nature. To what extent provisions of the C.P.C. are applied to a particular civil proceeding depends on the statute under which the tribunal is created. The fundamental rules of pleadings mentioned above are broadly applicable even to these civil proceedings, though because of the relatively summary nature of those proceedings the same rules may not apply in their full rigour. In many cases the proceedings are commenced not through a "plaint" but through an "application" or a "claim petition" and so forth.

Even though the fundamental rules stated above should apply *mutatis mutandis* even to an application, claim petition, etc., in such proceedings, yet it is necessary for the pleader to study the statutory provisions carefully so that a blind adherence to the provisions of C.P.C. may not land him in difficulty. For instance O.30, R.1 permits a partnership firm to sue or to be sued in the name of the firm. If the C.P.C. has been applied as a whole to such civil proceedings, then, of course, O.30, R.1 would also apply. But if the statute is silent on this point, then it would be necessary for all the partners of the firm to sue or to be sued jointly in their individual names, instead of in the name of the firm. Likewise, in respect of a claim petition before a Services Tribunal it may be necessary to implead

the appointing authority of the public servant claimant. In a suit before the civil court it is the Union of India or the State concerned which is required to be sued vide Article 300 of the Constitution of India. The appointing authority may be an authority subordinate to the Government but in a civil court it is not necessary or proper to implead such an authority as defendant. These points of difference should be noted while drafting pleadings in such civil proceedings.

III. Pleadings in writ proceedings

As the subject of writ jurisdiction is very wide, Part III has been completely devoted to it. While the fundamental rules about precision and certainty and conciseness which apply to pleadings in civil suit apply to writ petitions and to returns filed in answer to the writ petitions, there are some differences also. Unlike a plaint or written statement in a civil suit, a writ petition or its reply is always on affidavit. The writ petition is accompanied by an affidavit in which the paragraphs or parts thereof in which factual averments are made, and sworn or solemnly affirmed to be true by the party or its agent or other person familiar with the facts deposed to. There is a distinction between a pleading under the Code of Civil Procedure and a writ petition or a counter affidavit filed in a writ petition. While in a pleading that is a plaint or a written statement, the facts and not evidence are required to be pleaded , in a writ petition or as in the counter- affidavit not only the facts but also the evidence in proof of such facts have to be pleaded and annexed to it.[17] Secondly, a writ petition is not entirely similar to a plaint but partakes to some extent the character of a plaint and partly of a memorandum of appeal. The reason is that through a writ petition the validity of a judgment or order of an inferior tribunal or of some executive authority or quasi judicial body subject to the writ jurisdiction of the High Court or of the Supreme Court is assailed. While challenging the validity of such action or order it is necessary to point out the legal flaws therein. Thus a reference to legal provisions is not frowned upon in a writ petition or in counter affidavit or rejoinder to a counter affidavit filed in writ proceedings.

In writ proceedings, moreover, special and local Acts and Rules, Regulations or executive orders made thereunder come up for interpretation

17 *Bharat Singh* v. *State of Haryana*, A 1988 SC 2181.

and not merely the substantive civil law of the land as in a civil suit. Such laws are often subject to frequent change and it is sometimes difficult both for pleaders and for the courts to lay their hands on the up-to-date form in which such "law", using the expression in its widest sense as given in Article 13(3)(a) of the Constitution, exists at a particular time. It is, therefore, usual to quote in writ petition or to annex therewith detailed relevant provisions of such law, though it is not required in pleadings in a civil suit.

So far as *habeas corpus* petitions are concerned, where the party in custody is not able to engage a pleader or file a properly drafted petition, the courts allow considerable latitude and even entertain informal communications to them and treat them as writ petitions.[18]

Courts of late have adopted a liberal attitude in respect of *locus standi* as well so far as "public interest litigation" is concerned.[19] Even where the petitioner is not directly affected by the State action or inaction challenged by him, he may be allowed to approach the court through a writ petition if the matter is clearly in the public interest, particularly where the fundamental rights of the weaker sections of the people are involved.[20]

In the array of parties, again there are points of difference between a pleading in a civil suit and in a writ petition. In the case of weaker sections of the people, where fundamental rights are involved, even an unregistered association has been allowed to maintain a writ petition, though such an association, will have no right to file a suit. Again while in a civil suit it is the Union of India or the State concerned which has to be sued as the defendant, and an official of a Government can only be sued in his own name, in his personal capacity and not by his designation (unless the official is a Corporation Sole or a Corporation Aggregate), in a writ petition, however, any officer or authority who or which passed the impugned order

18 *Icchu Devi Choraria* v. *Union of India*, (1980) 4 SCC 531.

19 *Akhil Bharatiya S.K. Sangh* v. *Union of India*, A 1981 SC 298; *Peoples Union for Democratic Rights* v. *Union of India*, A 1982 SC 1473; *Janata Dal* v. *H.S. Chowdhary*, A 1993 SC 892; *Sub-Committee of Judicial Accountability* v. *Union of India*, A 1992 SC 320; *Bangalore Medical Trust* v. *B.S. Mudadappa*, A 1991 SC 192; *Subhash Kumar* v. *State of Bihar*, A 1991 SC 420; *Bandhua Mukti Morcha* v. *Union of India*, A 1984 SC 802.

20 *See post* "Public Interest Litigations" in Chapter XVIII.

can be impleaded as an opposite-party. Even an informal tribunal or court is required to be impleaded in its official name if a writ of Prohibition or of Certiorari is sought against it. If in the event of success of the writ petition pecuniary liability is likely to fall on the Government, then it is necessary to implead not only the competent authority whose order is in question but also the Union of India or the State concerned.

IV. Pleadings in an election petition

So far as the elections to Parliament and State Legislature are concerned, petitions to challenge them are governed by Part VI (Sec. 79 to 122) of the Representation of the Peoples Act, 1951. Section 87 lays down that subject to the provisions of this Act and of the Rules made thereunder every election petition shall be tried as nearly as may be in accordance with the procedure applicable under the C.P.C. to the trial of suits. Thus the fundamental rules of pleadings mentioned in this chapter govern an election petition as well. An election petition is, indeed, construed even more strictly than a plaint in a civil suit. The reason for the greater strictness in these proceedings is that the right to file an election petition is not a common-law right but a statutory right. Secondly, the respondent of such a case is a person who has been declared to have the confidence of the electorate and the courts are slow to interfere with the verdict of the electorate except when a clear case is made out. Thirdly, where corrupt practices are alleged by the petitioner and the petition succeeds, the respondent may not only be unseated but even becomes subject to disqualifications for future. The ingredients of corrupt practices are such that they are quasi-criminal in nature, and may be compared with matrimonial offences in so far as this aspect of the matter is concerned. The courts, therefore, insist on greater precision in regard to such petitions. They would also not allow an amendment to an election petition which may have the effect of permitting the petitioner to plead a new corrupt practice after the expiration of limitation for filing an election petition.

Chapter II

FACTS, NOT LAW

First rule of pleading : The first fundamental rule of pleading is that neither provisions of law nor conclusions of law be alleged in a pleading.[1] A plea on a mixed question of fact and law should be specifically taken, [2] but mere conclusions of mixed law and fact should not be alleged. The pleadings should be confined to facts only, and it is for the judge to draw such inferences from those facts as are permissible under the law, of which he is bound to take judicial notice.[3] A judge is bound to apply the correct law and draw correct legal inferences from facts even if the party has been foolish enough to make a wrong statement about the law applicable to those facts. It is a mistake to think that the judge is not bound to consider, or rather is bound, not to consider, any view of the law in respect of the facts before him except such as laid in before him formally by the parties.[4] If a plaintiff asserts a right in himself without showing on what facts his claim of rights is founded, or asserts that defendant is indebted to him or owes him a duty, without alleging the facts out of which such indebtedness or duty arises, his pleading is bad. On the other hand it is not necessary to specify in the plaint the provision under which the suit is being filed. Accordingly, the mention of a wrong provision will not prevent the court from granting relief under the correct provision.[5]

It is common to plead that the plaintiff is the legal heir of the deceased. This is an inference of law. What the plaintiff should show is how he is connected with the deceased. He should also account for other relations who were nearer to the deceased than the plaintiff. It is bad pleading to allege that the plaintiff is entitled to get certain money from the

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1 *Purshottam* v. *D. Ghee Co.*, A 1961 AP 143.

2 *Ram Prasad* v. *State of M.P.*, A 1970 SC 1818.

3 *Kedar Lal* v. *Hari Lal*, A 1952 SC 47.

4 *Guara* v. *Sri Ram*, A 1926 Nag 265; *Narayandin* v. *Mahesh Singh*, A 1926 Nag 313, 93 IC 103; *Somnath Singh* v. *Ambika Prasad Dube*, A 1950 All 121; *Maharashtra State Electricity Board* v. *Madhusudandas*, 67 Bom LR 919, A 1966 Bom 160; *R.M. Seshadri* v. *G. Vasantha Pai*, A 1969 SC 692.

5 *Pater Buchanan Lal & Macharg* v. *Mc Vey*, 1955 LAC 520; *Trailakaga Nath* v. *Bimala*, ILR (1953) 2 C 385.

defendant. Facts from which title to the money can be inferred should be alleged, e.g., that the plaintiff had lent the money to the defendant, or that the plaintiff had sold his goods to the defendant and the latter had promised to pay him the price on a certain date but had not paid it. It is equally bad to say that the defendant was bound to render accounts to the plaintiff. Facts making the defendant an accounting party should be clearly alleged, e.g., that the defendant was the agent of the plaintiff for purchase and sale of grain or that the defendant was a co-sharer or partner who was managing the joint property or business.

It is not sufficient to say that the plaintiff is entitled to a right of way over the defendant's land; he should show how he is entitled to that right, whether by grant, prescription, or an easement of necessity, or otherwise. Even that would not be sufficient; he should set out the facts upon which he relies as entitling him to the particular kind of easement.[6] He must, for example, state that the defendant's deceased father had in consideration of Rs. 2,500/-, granted to him, by a deed, dated January 5, 1965, a right to pass over the land; or that the plaintiff has been passing over the land in going from his house to the public road for more than 20 years before the suit, as of right and without interruption; or that the plaintiff and defendant were joint owners of the land in suit, that at a partition held in 1970, that land was allotted to the defendant, that the way of the plaintiff always lay across the land and that there is no other possible way through which the plaintiff can go from his house to the highway.

It is not sufficient to allege that the defendant was guilty of negligence.[7] Facts on which the defendant's duty, neglect of which is pleaded, is based, as also the facts which constitute, in the plaintiff's opinion, a breach of that duty should be alleged, and it should be left to the court to infer from them that the defendant has been guilty of negligence. It is not sufficient to plead that plaintiff is entitled to the property under a sale-deed from A. He should allege that A was the owner of the property,

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6 *Farrel* v. *Coogan*, 12 LR Ir 14; *Numia Mal* v. *Mahadeo*, A 1962 Punj 299, relying on *Harins* v. *Jenkins*, (1882) 22 Ch D 481 and *Spedding* v. *Fitzpatrick*, (1888) 38 Ch D 410.

7 *Gautrat* v. *Egerton*, (1867) 2 CP 371, 36 LJCP 191; *West Rand Gold Mining Co.* v. *Rex*, (1905) 3 KB 291, 74 LJKB 753.

and that he sold it to the plaintiff by executing a registered sale-deed in respect of it on such and such date.

In a case of defamation, the publication of defamatory statement should be alleged and it should be stated that the words were published or spoken to some named individuals and the actual words should be set out and the time and place, when and where they were published should also be specified in the plaint.[8]

Similarly it will not be sufficient to say that Abu Muhammad made a gift of his property to the plaintiff. The plaintiff should allege how the gift was made, how it was accepted, and how possession was delivered, because these are the facts which constitute a valid gift under the Muhammadan Law. Merely to allege the gift would be to state a conclusion of law from facts which are not stated. It is also insufficient to allege that there was *donatio mortis causa*[9] (gift in prospect of death). The relevant circumstances leading to this inference should be stated.

If facts are not stated in the plaint, it shall be held to be bad inspite of allegations of inferences of law which the plaintiff draws from those facts, e.g., even if it is alleged that the particular act complained of was done "unlawfully" "wrongfully" "improperly" or "without any justification therefor or right to do so", that would not be sufficient unless facts are alleged from which the plaintiff draws the inference that the act was unlawful, wrongful, improper or unjustified.[10] The plea that the "suit is misconceived" is bad, as facts should be pleaded from which the defendant claims to draw this inference of law.[11] A plea of maintainability of the suit is one of law and need not be specifically raised.[12] Where substance of the section is disclosed in the pleadings, omission to plead that particular section specifically is immaterial.[13]

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8 *Subbrayudh* v. *Ramakrishna Rao*, (1968) 2 Andh LT 101.

9 *Townsend* v. *Parton*, (1882) 45 LT 755, 30 WR (Eng.) 287.

10 *Gautrat* v. *Egerton*, (1867) 2 CP 371; *Day* v. *Brownrigg*, (1878) 48 LJ Ch 173, 10 Ch D 294 at 302 (such "epithets of abuse" are "useless and redundant").

11 *Shripada* v. *Divitia*, A 1948 Bom 20; *Gulzar Ahmad Zafri* v. *Govt. of U.P.*, A 1950 All 212.

12 *State of Rajasthan* v. *Rao Raja Kalyan Singh*, A 1971 SC 2018.

13 *Haji Abdulla H.A.S. Dharmasthapanam* v. *T.V. Hameed*, A 1985 Ker 93 (DB).

Similarly, the defendant is not, in a suit for price of goods sold to him, entitled to plead that he is not liable. He should allege either that he did not purchase the goods, or that they were never delivered to him, or that they were not of the quality ordered, or that they were sold on credit which has not yet expired. In a suit for damages for an alleged libel, it is not sufficient to plead that the defendant published the libel on a privileged occasion. He must set out the facts and circumstances on which he relied as creating the privilege.[14] So, a defence that section 41, Transfer of Property Act, protects the defendant is not good. The defendant should plead that he had taken the property for consideration from a person who was the ostensible owner of it, and that he, in good faith, believed him to be the owner. In a case relating to short delivery it should be specifically pleaded that the consignment was booked at railway risk rate because otherwise it would be presumed that it was booked at owner's risk rate.[15]

Instances of Bad Pleading : The following are some of the other instances of pleadings, offending against this rule, which do not ordinarily strike many pleaders as being wrong:

(*a*) The plaintiff *is the heir* of the mortgagor and the defendant *is the heir* of the mortgagee, hence the *plaintiff is entitled to redeem* the mortgage, and the defendant *has no legal right in the property but to take his mortgage money*. (The family connection of both should be shown.)

(*b*) The mortgage was made for a *legal necessity* and *is binding* on the son of the mortgagor. (The exact necessity should be specified. The latter part of the sentence is mere inference of law.)

(*c*) The defendant has been in possession of the mortgaged property and *is liable to render account of the income and expenditure*. (The liability, being statutory need not be pleaded.)

(*d*) The plaintiff *being a reversioner* is not legally bound by the transfers made by the Hindu widow in favour of the defendant. (A proposition of law.) How he is reversioner should be disclosed.

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14 Simmonds Dunne, (1871) Ir R 5 CL 358; *Elkington* v. *London Association for the Protection of Trade*, (1911) 27 TLR 329.

15 *Firm Mahadeolal Bhagirathmal* v. *Union of India*, A 1968 Pat 440.

(*e*) The mortgaged property *belonged to a joint Hindu family*, and the second defendant had no right to transfer the family property to the first defendant without the plaintiff's consent. (A proposition of law.)

(*f*) For the above reasons, the plaintiff's suit *is liable to be dismissed.* (An inference of law.)

(*g*) The mortgage-deed in suit *is void and is of no effect in law.* (Facts making it void and ineffectual should be pleaded).

(*h*) The property is the *stridhan* of AB (This is a conclusion of law; facts making the property the *stridhan* of AB should be stated.)

Tolerable Pleadings : But, while the strict rule of pleading requires that such legal inferences need not be pleaded, still sometimes in addition to the facts which are clearly pleaded, the inference is also pleaded, either for the sake of clearness or for convenience, as that sometimes makes the statements of facts more intelligible and shows their connection with each other. This has been tolerated even in England, as such pleading is, at the most, unnecessary, and does not affect or in any way embarrass the other party. For example, in a suit on hypothecation bond, if the defendant pleads that the bond was not attested by two witnesses, and *does not therefore amount to a mortgage*, the latter pleading may strictly be against rules, yet it may be tolerated.

Pleading Foreign Law and Custom : The rule against pleading law is restricted to that law only of which a court is bound to take judicial notice. As the court does not take judicial notice of foreign law, or of particular customs or usages of trade, they should be pleaded like any other fact, if a party wants to rely on them.[16] If a party relies on a usage at variance with the Contract Act [17] or with other general law [18] he should plead the usage with particulars about its incidents and details. If it is not pleaded no evidence to prove it will be admitted.[19] A custom which has

16 *Vishwanath* v. *Ram Narain*, A 1940 All 405, 190 IC 109; *Iqbal Hasan* v. *Sunni Central Board*, A 1972 All 123; *G. Annapurnayya v. A.Appalanarasimhamurthy*, 1994(3) ALT 49I (AP).

17 *Sital Prasad* v. *Ranjit Singh*, 1931 ALJ 390, A 1931 All 583.

18 *Kochan Kani Kunjuraman* v. *Metheran*, A 1971 SC 1398, (1971) 2 SCC 345; *Bhagat Singh* v. *Jaswant Singh*, A 1966 SC 1821.

19 *Thakur Gokul Chand* v. *Parvin Kumari*, A 1952 SC 231, 1952 SCJ 331.

repeatedly been brought before the courts, and has been recognised by them regularly and has thus acquired the force of law, need not be pleaded.[20] For instance, the custom amongst Jains in India, except in Madras and Punjab, authorising widows to adopt without husband's authority is presumed and need not be pleaded.[1]

Legal Pleas : This rule should not be considered as excluding legal pleas to suit, or pleas denying the legal right claimed by the opposite party. If a plaintiff claims as an heir on the ground of certain relationship, the defendant may take a legal plea that the plaintiff is not an heir, even assuming the alleged relationship to be correct. In a suit by a landlord for arrears of rent if a defendant denies the plaintiff's title, the plaintiff may plead an estoppel under Sec. 116, Evidence Act, against the defendant's plea. Similarly, pleas in bar of suit, e.g., of *limitation, resjudicata,* etc., may be raised. Such pleas are "objections in point of law" and raise what are called "Issues of Law".

Reference to Rules and Orders : In certain cases, a little relaxation of the rule discussed under this chapter will be advisable. Of late legislative amendments have been too frequent. Moreover, "law" means not merely a provision in an Act of Legislature or Ordinance but also comprises any order, bye-law, rule, regulation or notification having the force of law.[2] In view of the frequency of amendments in all such laws it is often difficult for pleaders and judges to keep abreast of them. It is, therefore, convenient if the latest position of such laws is set out in pleadings. Such a reference need not be regarded as violation of the rules of pleading. In any case the courts will do well to tolerate it in the interest of justice as this sometimes also serves to apprise the other party better, of the case he has to meet.

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20 *Banarsi Das* v. *Sumat Prasad*, 164 IC 1047, 1936 ALJ 1237, 1936 AWR 857, A 1936 All 641; *Dashrathlal* v. *Bai Dhondubai*, A 1941 Bom 262, 195 IC 464; *Rasool* v. *Ramzan*, A 1954 All 270 (custom of privacy); *Ballu* v. *Thakur Dan Singh*, 1950 ALJ 234, (1951) 2 All 559 (Custom of pre-emption in Kumaun); *Ujagar Singh* v. *Mst. Jeo*, A 1959 SC 1041.

1 *Manghibai* v. *Sugan Chand*, A 1948 PC 177, 1948 ALJ 255 (Under Hindu Adoption and Maintenance Act, such authority is now not required in respect of any Hindu, Buddhist, Sikh or Jain).

2 See, for instance, Articles 13 (3) (a) and 366 of the Constitution.

Chapter III

MATERIAL FACTS

Second rule of Pleading : The second fundamental rule of pleading is that every pleading shall contain, and contain only, a statement of the material facts on which the party pleading relies for his claim or defence.[1] The rule requires:

(1) that the party pleading must plead *all* material facts on which he intends to rely; and

(2) that he must plead *material facts only*, and no fact which is immaterial should be pleaded nor the evidence.

Their Lordships of the Privy Council have pointed out that the rule that all material facts should be pleaded is not mere technicality and that an omission to observe it may increase the difficulty of the court's task of ascertaining the rights of the parties.[2] The word, "material" meant necessary for the purpose of formulating a complete cause of action, and if any one material statement is omitted the statement of claim is bad."[3] If all the material facts constituting the cause of action are not averred in the plaint the suit has to fail.[4]

The plaintiff had alleged that he was "entitled to get free supply of water for wet crops raised" on the land "irrespective of the nature of the crops", but the facts on which he relied as the foundation of his right were not set out in the plaint. It is submitted that this pleading was bad also because an inference of law was pleaded. The legal inference should be left to be drawn by the courts.[5]

What are material facts : The first question is what facts are material. Every fact is material for the pleading of a party, which he is bound to prove at the trial (unless admitted by the other party) before he

1 O.6. R.2; *Manphul Singh* v. *Surinder Singh*, A 1973 SC 2158; *R.M. Seshadri* v. *Vasantha*, A 1969 SC 692, 699, 2 SCR 1019.

2 *Gopala Krishnayya* v. Madras Province, A 1947 PC 132.

3 *Bruce* v. *Odhams*, 1936 All ER 294.

4 *Vashisshta* v. *Glaxo Laboratories*, A 1979 SC 134.

5 *Gouridutt Ganeshi Lal* v. *Madho Prasad*, A 1943 PC 147; *State of Rajasthan* v. *Rao Raja Kalyan Singh*, A 1971 SC 2018.

can succeed in his claim or defence.[6] Material facts are those facts which a plaintiff must allege in order to show a right to sue or a defendant might allege in order to constitute his defence.[7] Facts which are not necessary to establish either a claim or a defence are not material. It is, therefore, obvious that the question whether a particular fact is or is not material depends mainly on the circumstances of the case. It is a question not always easy to answer.

There is a thin line of distinction between a material fact required to be given under O.6, R.2 and the particulars required to be given under O.6, R.4 & 6 as pointed out in chapter VI of this book. All the same a distinction exists. Before giving particulars the specific act of the other party constituting the material fact must be alleged. For example in a suit for specific performance of contract the plaintiff must allege that he was ready and willing and is still willing to perform his part of the contract. The failure to do so may result in dismissal of his claim.[8] In a suit for infringement of patent right it is necessary to allege, besides giving particulars of the said infringement, that the plaintiff had a patent right under Patent No.... A condition precedent whether imposed by law or agreement must be specifically pleaded though not its performance.

Before drafting his pleading, it is necessary for the pleader to master the law relating to the case in all its details and then he must apply his knowledge of the law, and his own common sense, to the facts of the case as narrated to him by his client, and decide which of the facts are material and must be pleaded and which are immaterial and must be omitted. If he is in reasonable doubt about a particular fact, it would perhaps be better for him to plead it than to omit it, for, if afterwards, it turns out that the fact was material he cannot be allowed to prove it, unless he can obtain leave

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6 *Bankey Ram* v. *Sarasti Devi*, 1977 RCJ 332 (FB); *Udhav Singh* v. *Madhav Rao Scindia*, A 1976 SC 744.

7 *Tika Khawas* v. *Pasupati Nath*, A 1986 Sikkim 6; *Sivananda Roy* v. *Janaki Balla* v. *Pattnaik*, A 1985 Ori 197.

8 *Abdul Khader Rowther* v. *P.K. Sara Bai*, A 1990 SC 682; *Mohd. Shakoor* v. *Cheddi Koeri*, 1995 RD 28, 1995 (4) CCC 409 (All); *Krishnan Kesavan* v. *Kochukunju Karunakaran*, A 1988 Ker 107; *Sabira Khatun* v. *Sayeda Fatima Khatoon*, A 1995 Gau 104; *Sanga Thevar* v. *Thanukedi Ammal*, A 1954 Mad 116; *Devi Sahai Premraj Mahajan* v. *Govindrao Balwantrao*, A 1965 MP 275.

to amend his pleading, which may either not be granted or be granted on strict terms as to costs.

Test to be applied : After the pleader has made up his mind what facts he has to plead, he should put them together and inquire whether, if all those facts were proved, his client would be entitled to a decree. If he can return an answer in the affirmative, he should then take up each fact and inquire whether, if he failed to prove that fact, his client could still succeed. If he could succeed, even without proving that fact, the fact should be eliminated, and what facts remain after such elimination would be the material facts which the pleader is bound to plead. If he finds that the facts he intends to plead would not, even if all of them were proved, result in the success of his client, and any further fact has to be proved, that further fact should also be pleaded.

Instances of immaterial facts : The pleadings in the lower courts are often found to be full of allegations of immaterial facts which should not be pleaded. For instance, in a suit for money due on a promissory note payable on demand, it is not necessary to allege that the plaintiff demanded the money and the defendant refused to pay it, because the money is payable immediately and no demand is necessary before suit.[9] In an eviction petition on the ground of bonafide requirement, it is not necessary to plead that no other accommodation is available in the city/town.[10] In a suit for ejectment against a trespasser it is unnecessary to allege that the defendant was asked to vacate the house but he refused to do so. In a claim for money lent, it is unnecessary to plead that the money was lent at the request of the defendant, or because the plaintiff had implicit confidence in the honesty of the defendant, or because the defendant was in straitened circumstances and had been recommended to the plaintiff by common friends. In a suit for price of goods sold to the defendant, it is not necessary to allege that the goods belonged to the plaintiff. In a suit for arrears of rent against a tenant, it is not necessary to plead the plaintiff's title to the property, for the defendant cannot deny it.

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9 *Meghraj* v. *Johnson*, 11 NLR 189; *Sk. Jammu* v. *Mohd. Ibrahim*, A 1926 Nag 194; *Secretary of State* v. *Prasad Bapuli*, 46 M 259.

10 *Sunder Singh* v. *Rajaram*, A 1991 MP 59.

The allegations of hostility between the parties or collusion between the opposite party and the enemities of the party pleading are not material. A plea that the evidence in support of the other parties' case is unreliable need not be taken in pleadings.[11] It is unnecessary to state that the defendant has trespassed on plaintiff's land at the instigation of plaintiff's enemies, or because the defendant owes a grudge and wants to tease the plaintiff. It is sometimes alleged that the defendant has not paid *in spite of his ability to pay*. The ability or inability to pay is not a material fact. In a suit for damages for assault, it is not material to allege the conviction of the defendant for the offence by the criminal court. In a suit for damages for a trespass on the plaintiff's property, it is not material to allege similar acts of trespass committed by the defendant before. It is also not material to allege that the defendant is a man of great influence in the village and the plaintiff is a poor and helpless cultivator. In an action by a creditor against a surety, there is no need to allege that the creditor gave the surety notice that the principal debtor had not paid. Sometimes it is also alleged in the plaint that the plaintiff files the *hundi* or pronote or copy of an account with the plaint. It is not necessary to allege that in the plaint.

Where a contract or transaction is illegal, there need be no pleadings of the parties raising the issue of illegality and the court is bound to take judicial notice of it.[12] Where substance of the section is disclosed in the pleadings omission to plead the particular section specifically is immaterial.[13]

A defendant need not plead to the prayer in the plaint nor to any matter which merely affects costs.[14] A defendant need not repeat those facts in written statement which are admitted or relied upon by the plaintiff in the plaint.[15]

Instances of material facts : On the other hand, in a suit for injunction, it is material to allege that the defendant "threatens and intends" to repeat the illegal act.[16] Where words of praise are spoken ironically so

11 *Girje Nandini Devi* v. *Brijendra Narain Chaudhary*, A 1976 SC 1124.

12 *Surasaibalini* v. *Phanindia Mohan*, A 1965 SC 1364; *Kamla Bai* v. *Arjun Singh*, A 1991 MP 275.

13 *Haji Abdulla H.A.S. Dharmasthapanam* v. *T.V. Hameed*, A 1985 Ker 93 (DB).

14 Odgers' Pleading p. 121 (9th Ed.).

15 *Lakshmi Narain Ram Narain* v. *State of Bihar*, A 1977 Patna 73.

16 *Stannard* v. *Vestry of St. Giles*, (1882) 20 Ch D 195, 47 LT 243.

as to convey a defamatory meaning, it must be alleged that they were so intended and understood. In an action for libel, the defamatory words must be clearly set out in the plaint. When the defamatory sense is not apparent, the 'innuendo' must be set out in specific terms.[17] When collusion is alleged between A and B, the fact that A knew the improper motives which actuated B is material.[18]

Where a suit is brought under a particular statute, all facts necessary to bring it under that statute must be alleged. When the rule of law applicable to a case has an exception to it, all facts are material which tend to take the case out of the rule or out of the exception. Where a party claims the benefit of a special rule of a particular school of Hindu or Muhammedan law, he should plead facts which would cause those rules to apply. For instance, where a Muslim dies leaving three grandsons by one son and two by the other son, then, all the five grandsons are his heirs. Under the Sunni school of Islamic Law, all the five grandsons would take one-fifth share each i.e., *per capita*. Under the Shia school, the principle of representation is applied and the grandsons take *per stirpes*. The grandsons of one branch will have to divide into three of their father's half share, while the grandsons of the other branch have to divide in half. Hence it is necessary to plead whether the deceased Muslim was a Sunni or a Shia as the case may be.

A plaint in Bank suit must specifically disclose (*a*) the rates of interest charged from time to time from the date of loan to date of suit, (*b*) the rates of interest permissible as per circulars/directives of Reserve Bank of India for the corresponding period, and (*c*) an averment that in the statement of Accounts, the debts regarding interest and other charges are in accordance with the terms of contract and Reserve Bank of India directions.[19] If proper particulars are given in the plaint, supported by corresponding documents, the scope of disputes will considerably be narrowed.

Effect of document : Whenever the contents of a document are material, it shall be sufficient in any pleading to state the effect thereof, as

17 *Hay* v. *Ashwini*, A 1958 Cal 269.

18 *British* v. *Britannica*, 59 LT 888.

19 *Vijaya Bank* v. *S. Bhathija*, A 1994 Kant 123.

briefly as possible, without setting out the whole or any part thereof, unless any precise words are material.[20] For instance, if a plaintiff, bases his claim on a sale deed, it is sufficient to say that A has sold the property to him by a deed, dated such and such. He need not state the words of the deed which amount to a transfer of the title. At the same time, it is not enough to say that he is entitled to the property under a deed dated, because this does not state the *effect* the document.[1]

If a person, not party to a deed which purports to be a sale deed, is entitled to show that the real intention of the parties to the deed was to create a mortgage, he should plead such intention and it will not be sufficient merely to plead that the plaintiff is only a mortgagee.[2] This, it is submitted, is too strict a view and the defendant, on his pleading that plaintiff was a mortgagee, should have been allowed to show how under a deed which was a sale the plaintiff was only a mortgagee.

Damages : How far allegation of damages sustained and other facts affecting damages are material and should be alleged in the pleading is another question for consideration. Damages are of two kinds: (1) General damages and (2) Special damages. *General damages* are such a loss as the law will presume to be the natural or probable consequence of the defendant's act. They need not be proved by evidence, e.g. in an action for trespass or libel or slander by words actionable *per se*, damages are allowed without any proof. Such general words as "whereby the plaintiff has been injured in his credit and reputation" or "whereby the plaintiff has suffered damage" are sufficient. But, strictly speaking, even these general words are not necessary. In such a suit, the plaintiff might only allege facts and end with the prayer for award of damages. In a case of road accident also it was held that no specific pleading is required for general damages.[3]

Special damages are such a loss as the law will not presume to be the consequence of the defendant's act, but which depends, in part at least, on the special circumstance of the case. It must always be proved at

20 O.6, R.9.

1 *Philips* v. *Philips*, (1878), 4 QBD 127.

2 *Rangubai* v. *Govind*, A 1949 Nag 243.

3 *Minor Veeran* v. *Krishnamoorthy*, A 1966 Ker 172.

the trial that the loss was incurred, and also that it was the direct result of the defendant's conduct. In many cases, proof of special damages is essential to sustain an action, e.g. a person has no right of action in respect of a public nuisance unless he can show some special injury to himself, which is over and above what is common to others.

It will, therefore, be readily seen that special damages must always be alleged in the pleadings as any other material fact. It is material because it is required to be proved by evidence, and no decree can be passed for it unless it is proved or admitted. Facts, with necessary particulars, must be mentioned to show what special damages the plaintiff suffered, and that they were the direct consequence of the defendant's act. In a suit for damages for incorrect valuation of answer-books, the special damages must be alleged and proved.[4]

In cases when general and special damages are both claimed, the latter should be specifically pleaded, with particulars; for instance in a suit for malicious prosecution, in which both the general damages for loss of reputation and mental and bodily pain as well as special damages, e.g. cost of defence, loss of professional business, etc., are claimed. But in either case it is not necessary for the defendant to plead to damages.[5] The question of damages shall be put in issue and considered in all cases without any pleading by the defendant. If, however, facts are alleged in the plaint which are material only as proof of the special damages claimed, and the defendant means to deny those facts, he had better do so, as that would at once give notice to the plaintiff of what the defendant means to challenge, but as the defendant is not legally bound to do so, his omission to deny any such fact would not amount to an admission by implication under O.8, R.5.

Facts in aggravation of damages : In order to ascertain the nature and extent of the injury done by the act for which the plaintiff claims general damages, it is often material to consider the circumstances under which the wrongful act was committed. Thus, in an action for trespass, the fact that the defendant entered the plaintiff's house with a false charge that plaintiff had got stolen property therein, is material as increasing the amount

4 *Subrat Ghosh* v. *Council of Higher Secondary Education*, A 1993 Ori 139 (DB).
5 O.8, R.3

of damages; so also in a suit for damages for breach of contract to marry, is the fact that plaintiff allowed herself to be seduced on the faith of the promise. Such facts are called "*matters in aggravation of damages*". Similarly, facts which tend to decrease the amount of damages are known as "*matters in mitigation of damages*". These facts are not, strictly speaking, material to the cause of action or to the defendant's defence, but are allowed to be proved only as affecting the amount of damages.

Under O.6, R.2, all material facts on which a party relies for his claim or defence should be pleaded in his pleading. It is true that O.7, R.1, requires the plaint merely to contain "the facts constituting the cause of action". Even though facts in aggravation of damages cannot strictly be said to constitute the cause of action for a suit, but it must be remembered that this rule is not prohibitive. It does not say what a plaint should not contain, but only lays down what it must. That does not necessarily imply that facts other than those mentioned in the rule should not be stated in the plaint, and when O.6, R.2, definitely provides that a pleading should contain all the material facts on which the party pleading relies they should be stated (whether they constitute the cause of action or not).

Facts in mitigation of damages : As to *facts in mitigation of damages*, they should be governed by the same rule as facts in aggravation of damages, because there is no reason why, if the latter are allowed to be pleaded, the former should not. Just as the latter are material facts on which the plaintiff relies for his claim, the former are also material facts on which the defendant relies for his defence. Under the general provision of O.6, R.2, therefore, they should also be stated in the defence, notwithstanding the provision in O.8, R.3, noted earlier. Neither Rule 3, nor any other rule, lays down that a defendant should not, or need not, state in his written statement the additional facts on which he relies in mitigation of the damages claimed from him. The fact that a defendant does not plead facts in mitigation of damages will not, however, bar the court from considering them when assessing damages.[6]

Facts not material at the present stage : Having seen what facts are material, it must further be remembered that no fact should be alleged in the pleading which is not material at the present stage of the action,

6 *Jansa* v. *S.K. Banoo*, 161 IC 593, A 1936 Nag 70.

although it may become material at a later stage, e.g, in view of the objections of the other party. It is not necessary to anticipate the answer of your opponent and to state what you would have to state in answer to it. A plaintiff cannot be expected to plead the facts on the strength of which he could meet the defence or falsify the claim of the defendants.[7] For instance, in a suit on a contract it is unnecessary to plead that the defendant was of full age when he entered into it. In an action for libel it would be a bad pleading for the plaintiff to allege in his plaint that the defendant *will* contend that the words are part of a fair and accurate report of judicial proceedings but it is not so.

It is also not necessary in a suit for trespass to allege in the plaint that the defendant committed the trespass under colour of a sale-deed alleged to have been executed by the plaintiff but that the said deed had never been registered and is otherwise void. But if you know for certain that the cover under which the defendant has committed the trespass and the defendant has, prior to your suit, asserted his right under that cover, there is no harm in pleading facts showing that the defendant's act under that cover was not justified. For instance, if a person takes a lease of joint family land from a junior member of the family and takes possession of the land expressly under that lease and gets his name recorded in the village records on the basis of that lease, the head of the family can sue him for ejectment and allege facts showing that the lessor had no authority to grant the lease, and that it is not binding on the other members.

Exceptions to the general rule : The general rule, that all material facts, and material facts only, should be pleaded, is subject to the following three exceptions :

(i) Condition precedent : The performance or occurrence of any condition precedent need not be alleged as its averment shall be implied in the pleading. If, however, the other party means to contest the performance or occurrence of such condition, he is bound to set up the plea distinctly in his pleading.[8] For instance, A agrees to build a house for B at certain rates. It is a condition of the contract that payment should only be made

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7 *Laxminarayan Deo Vasti Temple* v. *Narayan F Marathe*, 1995 (2) Bom C.R. 610.
8 O.6, R.6.

upon a certificate of B's architect that so much is due. In a suit for money due to A, the obtaining of architect's certificate is a condition precedent to A's right of action. In this case it is not necessary for A to allege that he has obtained the certificate. If B intends to contest the fulfilment of this condition, he should distinctly plead it. Under section 54 of the Cess Act (Bengal Act IX of 1880), a notice is a condition precedent to the liability to pay cess. A suit was brought for recovery of the cess but no allegation of the notice having been issued was made in the pleading nor was any plea raised in the written statement. The defendant was not allowed in appeal to plead that no notice was served upon him, and O.6, R.6, was applied.[9] Similarly, notices required to be given under the several Acts before institution of suits, need not be alleged in the pleadings, except, of course, where the law itself has provided to the contrary. For instance, the giving of a notice under section 80, C.P.C., before commencing a suit against the government or any public officer is a condition precedent, but it must be pleaded, as section 80 lays down that the plaint shall contain a statement that such notice has been delivered, but it is not necessary that the word "delivered" should be used so long as the plaint indicates that the notice has been delivered, e.g., if it is stated that a notice under section 80 has been given to Secretary to government by registered post, and that registration receipt of acknowledgment due are put on the record.[10]

Notice under section 80 was formerly necessary also in suits for injunction against the government,[11] but now a suit to obtain an urgent and immediate relief against the government or a public officer may be instituted, with the leave of the court without such notice.[12] Even though the provisions of section 80 have been held to be mandatory they are construed with due regard to commonsense and to the object underlying the section; thus the terms of the notice are not scrutinised in a pedantic manner. Substantial compliance with the section is sufficient.[13] As for the defendant it is insufficient to plead that notice under section 80 was illegal.

9 *Murlimanohar* v. *Raja Nand Singh*, 72 IC 1, A 1924 Pat 205.

10 *Mohammad Faruq* v. *Governor-General*, A 1949 Pat 93.

11 *Bhagchand* v. *Secretary of State*, A 1927 PC 176; *State of Madras* v. *Chitturi Venkata*, A 1957 AP 675.

12 Sec. 80 (2), C.P.C. as inserted by Act No. 104 of 1976.

13 *See*, Sec. 80 (3), as amended by Act 104 of 1976; also *Dhan Singh Sobha Singh* v. *Union of India*, A 1958 SC 274; *Ghanshayam Dass* v. *Dominion of India*,

A notice to the Railway Administration under the Indian Railways Act need not be pleaded in the plaint, nor a notice under section 10 of the Carriers Act.[14] In a suit by a firm of partners it is not necessary to allege that the firm is registered as required by section 69 of Partnership Act. It will be for the defendant to raise the plea that the suit was bad for non-compliance with that provision.[15] Where the plaintiff intends to sue in a representative character, the law required certain steps to be taken by him to enable him to institute the suit, e.g., obtaining letters of administration. This is a condition precedent, but O.7, R.4, requires that this fact should be mentioned, inspite of the general rule to the contrary.

Where, however, a plaintiff is conscious that he has not performed a condition, and has good excuse for such non-performance, he may, in his plaint, state the condition, the non-performance and the facts which afford him the excuse, e.g. that the defendant prevented or discouraged him from performing it.

This rule is not, strictly speaking, an exception to the general rule, as a "condition precedent" cannot be called a fact material for the cause of action of the plaintiff; it is only a condition superimposed on what otherwise would have been valid. Where, however, what appears to be a condition precedent is not really so but is really a part of the cause of action of the plaintiff for the suit, the rule will not apply and the performance of such condition must be alleged as any other material fact constituting the cause of action, for example, dishonour or notice of dishonour in a suit on a negotiable instrument, or the readiness and willingness of the plaintiff in a suit for specific performance[16] or the service of a notice to quit in the case of a suit for ejectment of a tenant at will, a tenant from month to month or a tenant from year to year. In a suit for ejectment of a tenant on the ground of forfeiture under section 111, Transfer of Property Act, it is necessary to allege the giving of notice required by that section, not because it is a condition precedent but because it is a part of the cause of action.

(ii) Matters of legal presumption : Neither party need, in any

(1984) 3 SCC 46, A 1984 SC 1004; *Sha Jetmal* v. *General Manager, Southern Railways*, A 1995 Kant 219.

14 *Le Ba Fin* v. *Tun On*, A 1938 Rang 437.

15 *Cheman Ram* v. *Ganga Saha*, A 1961 Orissa 94.

16 *Bhaurao Shamrao Bhame* v. *Modhorao Raghu Yelekar*, A 1979 Bom 208.

pleading, allege any matter of fact which the law presumes in his favour or as to which the burden of proof lies on the other side, unless the same has first been specifically denied.[17] For instance, a plaintiff in a suit on a promissory note or other negotiable instrument need not allege the consideration, as section 118 of the Negotiable Instruments Act, raises presumption in his favour. It is sufficient to allege the execution of the pronote by the defendant unless, of course, consideration is made a substantive ground of claim in the alternative. It is not necessary to allege in the plaint that the defendant executed the bond in plaintiff's favour without fraud, intimidation or coercion and of his own free will, because the burden of proving any fact invailidating the bond is upon the defendant. When defendant admits his thumb mark on the pronote, though he is illiterate, the burden of disproving the consideration for it does not shift from him.[17] But when a suit is brought on the bond of a *pardanashin* lady, it should be alleged in the plaint that the bond had been read out and explained to her, and she executed it of her own free will, after having independent advice, as it is for the plaintiff to prove these facts.[18] But if, say, in a suit for cancellation of a promissory note, the plaintiff alleges that it was without consideration, the defendant may plead that it was for consideration.

Presumptions referred to in this exception are those which a court is bound to make. In other words, only those facts need not be pleaded which a court "shall presume" within the meaning of the Indian Evidence Act; but facts which a court "may presume" should be pleaded.

(iii) Matters of inducement : It is sometimes desirable to commence a plaint with some introductory allegations stating who the parties are, what business they carry on, how they are related or connected, and other surrounding circumstances leading up to the dispute. These are not material facts, but they are allowed in England because they explain what follows. They are called "matters of inducement". On the analogy of English practice, they may be tolerated in India also, but a good pleader always reduces such prefactory statements to the minimum.

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17 O.6, R.13.

18 *Radha Raman* v. *Bhoji Ram*, 1979 ALJ 237.

Chapter IV

FACTS, NOT EVIDENCE

Third rule of pleading: The third fundamental rule of pleading is that every pleading must contain a statement of the material facts, but not the evidence by which they are to be proved.[1] The material facts on which a party relies are *Facta probanda* (i.e. the facts to be proved), and they should be stated in the pleadings. The evidence or the facts by means of which they are to be proved are *Facta probantia,* and they are not to be stated. They are not the facts in issue, but only relevant facts which will be proved at the trial in order to establish the facts in issue. In some cases the two kinds of facts are so mixed up as to be almost indistinguishable, e.g. in cases of custom based on village administration paper (*Wajib-ul-arz* in U.P.), which is often the basis of the claim and its sole proof. In such cases the record has to be pleaded. So also, where the whole case is based on entries in account books. But such cases are rare. Ordinarily, the distinction between the two kinds of facts is so clear and sharp as to be easily discernible and must be remembered when drawing up a pleading. It has been held that in Punjab, *Wajib-ul-arz, Rewaj-i-am* and Manual of Customary Law which record customs are only evidence of custom and it is not necessary to refer to them in the plaint but the plaintiff who alleges custom is entitled to rely on them; therefore, if he has referred to *Wajib-ul-arz* in his plaint, he cannot be precluded from relying on *Rewaj-i-am.*[2] The question of appreciation of evidence is not to be pleaded, instead it is the duty of the court to consider whether the documents produced by the parties prove the facts in issue.[3]

An excellent illustration of the principle just enunciated is contained in an action on a policy of life insurance.[4] One of the terms of the policy was that it would become void if the policy holder "died by his own hand", and the defendant insurance company wanted to defend the claim on that ground. It was alleged in defence that the policy holder had, for weeks,

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1 O.6, R.2; *Mohan Lal* v. *Kurkut Utpadak Sahkari*, A 1989 Raj 102.
2 *Jwala Singh* v. *Province of Punjab*, A 1948 East Punjab 59.
3 *Birad Mal Singhvi* v. *Anand Purohit*, A 1988 SC 1796 (para 12).
4 *Borradaile* v. *Hunter*, (1843) 5 Mau. & G 639.

been in a moody miserable state, that he had brought a pistol the day before his death, and that on him was found a letter to his wife stating that he intended to kill himself. It was held that all these facts were merely evidentiary facts and should not be alleged in the pleading, but it was sufficient to say that the assured "died by his own hand". If the facts of this case are thoroughly understood, it would act as a guide in very many cases and tend to simplify and shorten pleadings. Many a pleader would, in similar set of circumstances, would be tempted to set out a long history of the man's previous mental condition and of all his actions leading up to the commission of the fatal act. This case shows that all this would be unnecessary on the ground that they are *Facta probantia* and not *Facta probanda.*

Another interesting illustration is of the case in which the defendant had pleaded all kinds of evidence to show that he was an Earl, and had been received as an Earl and had voted as an Earl, etc.,but there was no distinct allegation that the defendant was the Earl of Stirling. The result was that the whole plea was struck out.[5] When the main question to be raised in the pleading is that A had express authority to enter into a contract on behalf of the defendant, it may be pleaded that "the defendant had employed A as his agent to make the contract", or "that A was the *Mukhtar-aam* of the defendant, having under the *Mukhtar-nama* full authority to make the contract on behalf of the defendant", but it should not be alleged that " when A made the contract he represented that he was the defendant's agent", or that "A has all along been regarded by all the constituents of the defendant as having that authority". These averments need be made only when a case of implied authority or holding out is intended to be made out.

In a suit for damage resulting from defendant's wrongful act, the facts establishing the connection between the alleged damage and the wrongful act should not be pleaded. It is sufficient to allege the wrongful act, that the defendant caused it, and that the plaintiff suffered damage thereby. In cases where time was not the essence of a contract, it is sufficient to allege that the work was done "within a reasonable time in that behalf". It should not be alleged that the weather was bad, that the men had struck

5 *Digby* v. *Alexander*, 8 Bing. 416, 430.

work or that there was any other reason why it took so long; that is the evidence by which it has to be proved that the time in fact occupied was reasonable.

Admissions : The most common instance of pleading evidence is that of setting up previous admissions of the opposite party. Admissions are certainly the best evidence of the facts admitted but they should find no place in a pleading.[6] Previous statements of the party pleading, corroborating the allegations about material facts are also very often alleged in the pleadings. For instance, in a suit for damages for assault, it is often alleged that the plaintiff had made a report of the fact at the police station, or had filed a criminal complaint against the defendant the same day. In a suit on lost bond, the fact that the plaintiff had made a report of the loss to the police at the time the loss had occurred is also often wrongly alleged in the plaint.

In a suit for recovery of the price of articles purchased by the defendant from time to time, or for recovery of the balance due from the defendant on account of money borrowed by him from time to time, what are necessary to be pleaded are the various transactions of the defendant. If the transactions are entered in a *bahikhata,* the entries need not be referred to in the pleadings. If, as often happens, balances have been struck and signed by the defendant, they are not to be pleaded as they are mere admissions of the correctness of the previous items and therefore mere evidence, unless—(1) they are set up as acknowledgements to save limitation, or (2) they were coupled with fresh promises to pay, and are themselves made the basis of the suit. In the latter case, the original items are not to be stated in the pleadings. Both should be stated only when the suit is based alternatively on the balance on the account stated and the original contract. Similarly, alleging the fact that notices had been exchanged between the parties, and in the plaintiff's notice he did not claim the amount now sued upon, would be bad pleading on the part of the defendant.

It is most common for the defendant, in a suit for money lent, to plead that the plaintiff is himself indebted and is not in a position to lend money to others, or that the defendant is himself a well-to-do man and had no necessity to borrow money from others. All these are pieces of circumstantial evidence and should never be pleaded.

6 *Banumal* v. *Newandmal*, A 1921 Sind 159, 83 IC 860.

Three practical applications of the rule : The following rules enacted in the Code of Civil Procedure are no more than practical applications of the general rule that facts, and not evidence, should be pleaded, and must be regarded only as its illustrations :

(1) Condition of mind : Whenever it is material to allege malice, fraudulent intention,[7] knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact, without setting out the circumstance from which the same is to be inferred,[8] for the circumstances would be no more than evidence of the fact. In a suit for malicious prosecution, the plaintiff should only allege in the plaint that the defendant was actuated by malice in prosecuting him. He should not allege that he had previously given evidence against the defendant and the defendant had vowed to take revenge, though he can give evidence to prove these facts. In a suit against a defendant, on whose representation of A's solvency, the plaintiff sold goods on credit to A, it is sufficient to allege that "the said representation was false, and was then known by the defendant to be so, and was made by him with intent to deceive and defraud or injure the plaintiff.[9] No facts or circumstances from which the plaintiff has drawn this conclusion need be pleaded. But this does not mean that full particulars of the fraud should not be given. It will not be sufficient to say that the defendant committed a fraud [10] or undue influence.[11] Particulars as to the nature of the fraud and how it was committed must be alleged, but not the evidence by which it is intended to be proved. In cases of misrepresentation, fraud, undue influence, breach of trust, willful default and coercion, full particulars must be set forth and there can be no departure from them in evidence.[12] Moreover, undue influence and

7 Intention is a question of fact and must be specifically pleaded, *Purna Nand Puri* v. *Kamala Sinha*, A 1965 Pat 39

8 O.6, R.10.

9 Vide C.P.C. Appendix A, Pleading No. 22.

10 O.6, R.4.

11 *Afsar Sheikh* v. *Soleman Bibi*, (1976) 2 SCC 142.

12 *Bishundeo* v. *Segoeni Rai*, A 1951 SC 280; *Raja Srinivas* v. *S.D.O. Mirzapur*, A 1962 All 590; *Mashkurul Hassan* v. *Union of India*, A 1967 All 565; *Fatema Bi Ammal* v. *A.A. Mehomed Mohideen*, (1971) 2 MLJ 451; *Bakshi Lochan Singh* v. *Jattedar Santokh Singh*, A 1971 Delhi 277; *Musei Puhan* v. *Ambica Bewa*, 1972 (1) CWR 338; *Bishnu Priya Dei* v. *Brusabhanu Maharaja*, A 1976 Orissa 163; *Kunhamina Umma* v. *Special Tahsildar*, A 1977 Ker 41.

coercion should be specifically pleaded. Even though they may overlap in part in some cases they are separate categories in law.[13] In a suit filed against the government restraining it from taking any proceedings against the plaintiff under Foreigners Act, plaintiff alleged coercion but did not give particulars thereof. It was held that allegations of coercion cannot be taken notice of.[14] The distinciton between a condition of mind as fraudulent intention and fraud should be carefully understood. The former is a fact and can therfore be alleged as such. The latter is an inference from facts and cannot be alleged without the facts from which the inference is drawn. Even in case of negligence which is not correlated to state of mind, it is necessary to give particulars in the plaint.[15] All particulars of negligence must be given so that the opponent may be in a position to meet the case.[16]

In a case for damages for having been bitten by the defendant's dog, it is sufficient to plead that the defendant knew that the dog was of a ferocious and mischievous nature. It need not be alleged that, on a former occasion also, the dog had bitten another man in the defendant's presence, or that another man had warned the defendant of the nature of the animal, for all these facts would be mere evidence of knowledge.

(2) Notice : Whenever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material.[17]

There are many cases in which notice has to be alleged as a material fact, e.g., in a suit to recover trust property from a person to whom a trustee has given it in breach of the trust, or, in a suit where priority for subsequent transfer is claimed or where marshalling is set up, or, where a prior mortgagee claims to tack subsequent advance in pursuance of contract in the mortgage-deed. In all such cases, it is enough to plead that the defendant had notice of the plaintiff's contract or of the trust, etc.

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13 *Bishundeo* v. *Seogoeni Rai*, A 1951 SC 280 (para 34).

14 *Mahiva* v. *Union of India*, A 1971 Cal 507, relying upon *Bishundeo*, supra.

15 *Vanaspati Traders* v. *Union of India*, ILR (1965) 2 All 127, A 1966 All 333.

16 *Punjab National Bank Ltd.* v. *Firm Ishwar Bhai Lalbhai Patel & Co.*, A 1971 Bom 348; *Gaeutret* v. *Egerton*, A 1922 Pat 17.

17 O. 6, R. 11.

The circumstances from which the notice is to be inferred need not be narrated, e.g., it need not be alleged that the defendant was an attesting witness to the plaintiff's deed, or that the plaintiff had himself told him of his contract, or that the defendant's son was present at the time of the contract and must have informed the defendant of it.

Sometimes the form is, or the precise terms of the notice are, material and, in that case, the same should be alleged. For example, when the plaintiff claims to have determined a monthly tenancy by a 30 days' notice to quit the pleading should be like this: "On November 16, 1977 the plaintiff served upon the defendant a written notice *calling upon him to vacate the house and deliver up possession to him on the expiry of December 15, 1977.*"

(3) Implied contract : Whenever any contract or any relation between any persons is to be implied from a series of letters or conversations, or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances without setting them out in detail. And if, in such a case, the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.[18] The reason of the rule is that what is really material is the effect of the letters, etc., and the letters etc., are only evidence of that effect. The most common example of implied contract is a carrier's contract to carry goods, which is implied from the fact that their clerk or agent accepts the goods and gives a receipt therefor. Similarly, a contract of tenancy may be implied from payment and acceptance of rent. A contract of indemnity may be implied where one who is only secondarily liable performs, under compulsion of law, an obligation for which another person is primarily liable. In all such cases, the conversation, conduct or circumstances, from which the contract is to be implied should be referred to in the pleading, with an allegation of the contract to be implied. But though the letters, conduct, etc., need not be set out in detail, sufficient particulars should be given to specify the same. For instance, if payment of rent is referred to, it should be alleged when, by whom, and to whom was the payment made, and

18 O.6, R.12.

of what amount. If letters are referred to, their dates must be given. If conversation is referred to, it must be alleged between whom it took place, when and where. Thus, "there was a contract to pay commission at the rate of 75 paise per cent, interest at 50 paise and charity at 6 paise per cent, which is to be implied from the conversation which took place between the plaintiff and Mulraj, the *Munim* of the defendant, at the plaintiff's shop on *Basakh Badi* 2 when the transactions between the parties commenced". Or, "an agreement authorising the plaintiff to sell the said grain pits on the defendant's failure to comply with the plaintiff's demand for more earnest money is to be implied from the correspondence which passed between the parties in the month of *Baisakh* 1979". It must, however, be remembered that no amount of evidence can be looked into for a plea which was never put forward.[19] (On this, see further, Chapter VIII, *post*).

Whenever a party wants to rely upon a plea of estoppel whether as an intentional inducement like the one u/s 115, Indian Evidence Act or a promissory estoppel or an unintentional inducement envisaged by section 41, Transfer of Property Act or any other provision of procedural law or substantive law, facts relating to the same must be clearly stated.Otherwise the other party will not be precluded from contesting the claim and the courts may ultimately find the plea unsustainable.[20] In an adoption case where facts relating to estoppel were not alleged in the plaint, the High Court did not allow such a plea to be raised at later stage. It observed that the plaintiff must have set up such a plea specifically in the plaint making the necessary averments for sustaining such a plea.[1] Similarly, where the petitioners did not raise the plea of promissory estoppel before the High Court, neither the plea emerged from the petition nor from the affidavits filed before the Court, the Supreme Court held that the petitioners were not entitled to invoke the doctrine of promissory estoppel.[2]

19 *Siddik Mahomed Shah* v. *Mst. Saran*, A 1930 PC 57; *Hemchand* v. *Pearey Lal*, A 1942 PC 64; *Punit Rai* v. *Mohd. Majid*, A 1964 Pat 348; *State of West Bengal* v. *Fakir Mohammad*, A 1977 Cal 29; *Hera Singh* v. *4th Addl. District Judge*, 1979 ALJ 586; *Kanagarathiam* v. *Perumal*, A 1994 Mad 247 (DB).

20 *Milak Brothers* v. *Union of India*, A 1990 SC 2256;

1 *Sohanadri Rao, in Re.*, A 1933 Mad 42.

2 *Shri Bakul Oil Industries* v. *State of Gujrat*, A 1987 SC 142

Chapter V

FORM OF PLEADINGS

Fourth rule of pleading: The fourth rule of pleading is that the material facts should be stated in the pleading "in a concise form"[1] but with precision and certainty. The pleading shall, when necessary, be divided into paragraphs, numbered consecutively.[2] Dates, sums and numbers shall be expressed in figures, as well as in words to ensure that the parties do not at a later stage take the plea that wrong dates, sums and numbers had been mentioned due to accidental, clerical or typographical error.[3]

But it must be remembered that, while the pleadings should be concise, they should never be obscure. They should be both concise as well as precise.[4] If the facts are lengthy they should certainly be given in all their particulars and prolixity alone will not justify the striking out of pleadings, if the facts stated are all material.[5] The aim of the pleader should be to state all his material facts with precision, but as briefly as he can. A specimen of bad pleading on the part of a defendant in a suit for recovery of debt is the following:

"The defendant does not know the plaintiff; he has never in his life been to the plaintiff's house and has not borrowed the money from him." The pleading is defective because it is neither concise nor precise. It should be something like this "The defendant did not borrow the money alleged in the plaint or any money from the plaintiff".

Brevity : Each party should state his whole case with brevity. *Brevity* can be attained—(1) by omitting all unnecessary facts, (2) omitting all unnecessary details when alleging material facts, and (3) by giving proper attention to the language used in alleging material facts.

We have already seen what are the unnecessary facts which should be omitted from a pleading. They are, matters of law, matters of evidence, matters not alleged in the opponent's pleading, matters presumed by law,

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1 O.6, R.2 (1)
2 O.6, R.2 (2)
3 O.6, R.2 (3), Introduced by Act 104 of 1976.
4 *L. and L. Insurance Co. Ltd.* v. *Binoy Kumar*, A 1945 Cal 218.
5 *Davy* v. *Garett*, (1878) 7 Ch D 473; *Geap* v. *Marris*, 2 QBD 630.

the performance of conditions precedent, the words of documents, matters affecting costs only, and matters not material to the case. The defendant need not plead to the prayer of the plaintiff or to the damages claimed or their amount.

As to details, only unnecessary ones are to be omitted. Those that are necessary should in all cases be given. O.6, R.4, requires that necessary particulars should be given. This matter will be dealt with more fully in the next chapter.

The language used should be precise, and a mastery of the vocabulary and grammar of the language in which pleadings are drafted is essential.

Precision : The other quality of good pleading, is *precision*, which can be attained by remembering the following rules of guidance:

(*a*) Names of persons and places should be accurately given and correctly spelt; in any case, the spelling adopted at one place should be adhered to throughout.

(*b*) Avoid pronouns, such as "he", "she", "this", or "that", unless the antecedent is mentioned so close by, that there can be no mistake as to the person or thing to whom the pronoun refers.

(*c*) As far as possible, do not refer to the plaintiff or defendant by their names only. Call them "the plaintiff" or "the said defendant", or if more than one, "the plaintiff No. 1", "the defendant No. 2", or "the plaintiff *Ram Chandra*", or "the defendant *Ahmed Hasan*", but, in whatever way you refer to a man at one place, refer to him in the same way throughout.

(*d*) Things should be called by their correct names and, in any event, the same thing should be described by the same name. It is bad pleading to call the same property "land with trees" at one place, "grove" at another, "trees with the land under them" at a third place in the same pleading; or "document, dated the November 24, 1974" at one place, "*hibanama*" at another, and "*dan patra*" at the third.

(*e*) If you are suing on a document, or on the basis of an Act, use the language of the document or the Act itself and do not invent your own language, however correct it may be. For instance, if a policy becomes void "if the assured shall die by his own hand", do not plead that "the assured killed himself" or that "he committed suicide", plead that "the

assured died by his own hand". If a mortgage deed contains covenant that "if the mortgagee is dispossessed by the mortgagor, the former will be entitled, etc.", plead that "the mortgagee was dispossessed by the mortgagor" and not that "the mortgagor has wrongfully ejected the mortgagee".

(*f*) Allege your facts boldly and plainly, without beating about the bush. "Ifs" and "buts" should be avoided as far as possible.

(*g*) Avoid the habit of describing facts in passive voice, omitting the nominative, e.g. the defendant's money was paid up. Say instead that "the plaintiff paid up defendant's money".

(*h*) Avoid complex sentences. Instead of using one complex sentence, it is better to divide the matter into several simple sentences. The following is a bad form of pleading: "The defendant, as the son of A, is liable to the plaintiff in damages for breach of a contract to sell his house made by the said A in favour of the plaintiff by an agreement dated December 10, 1974." Instead of this, say—

"1. By an agreement dated December 10, 1974, A agreed to sell his house to the plaintiff.

2. A did not perform the said contract during his lifetime.

3. A died on——, and the defendant is his son and representative.

4. The plaintiff called upon the defendant to perform the contract entered into by his father, but he refused to do so.

5. The plaintiff claims damages."

(*i*) Divide your pleadings into separate paragraphs, and state, as far as possible, only one fact in one paragraph.

(*j*) Avoid repetition.

(*k*) All necessary particulars should be embodied in the pleadings. *This rule requires a long discussion and explanation, therefore the whole of the next chapter has been devoted to it, and it should be read as a supplement to this chapter.*

Forms : In order that there should be no error in pleading the Legislature has prescribed a few forms of pleading which are to be found in Appendix A of the Code, and it is required that, when applicable, these forms, and when they are not applicable, forms of like character, as nearly

as may be, shall be used for all pleadings.[6] They are to be taken only as the standard of requisite brevity and as specimen of the character of pleadings required but are not to be adhered to slavishly.[7]

Signature : The law further requires that every pleading shall be signed by the party and his pleader (if any).[8] The object of this rule is to prevent disputes as to whether the suit was instituted with, or without, the plaintiff's knowledge and authority. If there are several plaintiffs, the plaint should be signed by every one of them, though it cannot be said that a person cannot be treated as a plaintiff *until* he has signed the plaint.[9] It is sufficient if one of the plaintiffs signs the plaint with knowledge and authority of other plaintiffs.[10] It is also sufficient if one of the two plaintiffs signs the plaint and both sign the *vakalatnama* accompanying the plaint.[11] Under the General Clauses Act,[12] "sign" includes "mark" also, in case of a person who is unable to sign. The thumb mark or pen mark of a person not able to sign his name is therefore as valid as a signature.[13] The Code of Civil Procedure further provides that the word "signed" also includes stamped.[14] It is not, however, necessary for a perosn affixing his name stamp to a pleading that he should be unable to write his name.[15] But mere initials of a person who can write his name should be avoided. It should also be noted that a pleading should be in existence before it is signed, and therefore, signing a blank sheet of paper before the pleading is drawn up is not in order, and the pleading written out subsequently upon such sheet of paper would be defective.[16] If pleading is not signed by a party his subsequent signature thereon cannot date back to the date of pleading.[17] It is not necessary that every page of the pleadings

6 O.6, R.3.
7 *Ram Prasad* v. *Hazarimall*, 134 IC 538, 58 C 418, A 1931 Cal 458.
8 O.6, R.14; *Basdeo* v. *Smidt*, 22 A 55.
9 O.6, R.14.
10 *Bibi Asghari* v. *M. Kasim*, A 1951 Pat 323; *Sirju* v. *Badri*, A 1939 Nag 242.
11 *Ram Charan Singh* v. *Board of Revenue U.P.*, 1968 ALJ 59.
12 Sec. 3 (56)
13 *Mohani* v. *Bungsi*, 17 C 580.
14 Section 2 (20) C.P.C.
15 *Maharaja of Banaras* v. *Debi Dayal*, 3 A 575.
16 *Girdhari* v. *Kanhaya* 15 A 59
17 *Kehar Singh* v. *Mahant Avtar Singh*, 69 Punj LR 238.

must be signed by all the parties to it.[18]

Proviso to the General Rule : O.6, R.14, which requires a party to sign a pleading is subject to a proviso to the effect that where the party is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorised by him to sign the same, or to sue or defend on his behalf. The words, "duly authorised" need not be restricted to mean authorised by proper written authority or by power of attorney but may even be oral.[19]

It is only when the party is unable to sign the pleading that his agent can do so. Mere absence is not sufficient; the absence should be of such a kind which makes signature impossible. The words "other good cause" are of wide importance and leave the matter in the discretion of the court.[20] The court should be satisfied, by affidavit or otherwise, that there is a sufficient reason for dispensing with the signature of the party, and that the person who proposes to sign the pleading on his behalf is an authorised person. A formal application should generally be made in such cases and a formal order should be recorded by the court, but no notice of any such application is necessary to be served on the other party. Though such a formal application is nowhere mentioned in the Code, yet it becomes necessary in order to explain the reason for the party not signing himself and to obtain a finding from the court that the reason is sufficient. This can also be stated in the pleading in a separate para or in a note at the end.[1] It is not necessary that the person authorised should be authorised specifically to sign the pleading. A general authority to sue or defend on behalf of the party is sufficient.[2] But a pleader cannot sign on behalf of the party.[3] Where, however, the manager of a Bank gave power of attorney to one of the directors, who was also a pleader to institute a suit, a plaint signed and verified by the pleader was held to be regular.[4] In a suit for recovery of money due on accounts, the plaint was not signed and verified

18 *R.P. Nautiyal* v. *Chandra Mohan*, A 1985 All 118.

19 *All India & Co* v. *Ram*, A 1961 Bom 252; *Subbiah* v. *Sankare*, A 1948 Mad 396; *Sarju* v. *Badri*, A 1936 Nag 242; *Bengal Jute Mills* v. *Jeewraj*, A 1943 Cal 13.

20 *Chandra* v. *Ganpat*, 4 NLR 117.

1 *Madan Lal* v. *Union of India*, A 1955 Bhopal 18.

2 *Kastalino* v. *Rustomji*, 4 B 468.

3 *Leakat* v. *Biseswar*, 16 IC 255, 16 CLJ 578.

4 *Narthu Ram* v. *The Lyalpur Bank*, 69 IC 422 Lah.

by plaintiff but by the manager of plaintiff. Power of attorney was produced at the time of trial. It was held that the principal having ratified the act of manager, the defect stood cured.[5]

The way in which authority is obtained is immaterial, so long as the authority is there, e.g. if a power of attorney is obtained from a prisoner in jail in contravention of jail regulations, i.e., not through the Superintendent of Jail, the authority is not invalid.[6] It has been held that an agent, authorised to enter appearance, can sign an amended plaint, if the suit was instituted with the plaintiff's approval.[7] Even authority given after the institution of a suit to a servant who has signed the plaint originally without a formal authority was held to be sufficient.[8] It has even been held that where a suit was duly authorised by a person the question whether his signature was made by him or by somebody on his behalf becomes immaterial.[9] The court should not make a fetish of rule 14 but apply it according to reason and common sense.[10] The court can also allow properly authorised person to sign plaint after holding that it had been signed by a person lacking proper authority.[11] It is not obligatory to file the authorisation along with the pleading.[12]

Verification: In addition to being signed, a pleading has also to be verified by the party, or by one of the parties pleading or by some other person proved to the satisfaction of the court to be acquainted with the facts of the case.[13] The object of verification is to fix responsibility for the statement made.[14]

The distinction between the requirements of signature and verification should be noted. While the pleading should be signed only by the party (all the parties) or, in special cases only, by his authorised agent, a

5 *M.C.S. Rajan* v. *National Nail Industries*, (1975) 2 MLJ 490.
6 *Bisheswar Nath* v. *Emperor*, 16 ALJ 64, 44 IC 28, 40 A 147.
7 *Palaniappa* v. *Firm*, 25 IC 136.
8 *W. Johnston* v. *Sir Rameshwar Singh*, 104 IC 747 Pat.
9 *Sarju Prasad* v. *Badri Prasad*, A 1939 Nag 242.
10 *B.R. Sharma* v. *Nanak Chand*, A 1967 All 487.
11 *Mohd. Islam* v. *Delhi Waqf Board, Delhi*, ILR (1966) 1 Punj 324.
12 *K.A. Mangatayaramma*, (1984) 2 An WR 292.
13 O.6, R.15.
14 *Devi* v. *Chairman Election Tribunal*, A 1956 All 19; *J.B.Ross* v. *C.R.Seriven*, A 1917 Cal 269, 34 IC 235 (DB).

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verification may be made by any one person, either the party, or any one of the parties, or *any* other person, acquainted with the facts. The laxity in the latter case is due to the fact that, while signatures are necessary to show that the pleading has been filed with the knowledge and approval of the party, the object of verification is only to fix the responsibility for the statements made therein upon some one,[15] before the court proceeds to adjudicate upon them. As false verification is an offence punishable under the Indian Penal Code,[16] the responsibility of verification is very great and should always be realised.

In the case of verification, it is not necessary that there should be some good cause before a party can be relieved of the duty of verifying his pleading, or that the person verifying is authorised to do so. All that is necessary is that if any other person does that work, he should satisfy the court, by affidavit or otherwise, that he is acquainted with the facts of the case. It is not necessary to make formal application for permission to make the verification. Affidavits will not generally be required in cases where the person verifying are persons in charge of the business to which the pleading relates or are recognised agents of the parties.[17] If, however, the rules of any High Court require that the fitness of the person verifying should be proved by affidavit, such affidavit becomes indispensable, and it has been held that the rule is mandatory and gives no discretion to the Judge to make exceptions.[18] But no one (except a party) should be allowed to verify a pleading unless he is able to verify the main allegations on personal knowledge, for otherwise, he cannot strictly be said to be acquainted with the facts. It is true that "acquainted" is a wide word and may also mean "acquainted on the authority of information received from others",[19] but, having the proper object of verification in view, courts will do well if, in case the man verifying is not able to verify the main allegations on his personal knowledge, they refuse to regard such a man as one acquainted with the facts of the case. Of course, about minor facts or matters of detail, the verification may be on information received. But a

15 *Basdeo* v. *Smidt*, 22 A 55; *J.B.Ross* v. *C.R.Seriven*, A 1917 Cal 269, 43 C 1001.
16 Section 199 I.P.C.
17 *Kastalino v. Rustomji*, 4 B 468.
18 *Manindra Chandra* v. *Velji Mulji*, 105 IC 564, 31 CWN 1031, A 1927 Cal 773.
19 *Port Canning Co.* v. *Dharnidhar*, 9 CWN 608.

court has always general power to require the party himself to verify his pleading,[20] and this power should always be exercised when the statements made are of scandalous nature,[1] or where a party alleges gross fraud based on facts known to him.[2]

The verification is not required to be made in the presence of the court, but it has been held in Bombay that it is desirable that verification by persons other than parties should be made before the court, unless there are sufficient reasons for dispensing with the attendance of the person verifying.[3]

Pleading by Banks, Corporations, Firms, Government, by whom Signed and Verified : The above rules about the person who should sign and verify a pleading are subject to this modification that in cases where a corporation is a party, pleading may be signed and verified, on behalf of the corporation, by the Secretary or by any Director or other principal officer of the Corporation who is able to depose to the facts of the case.[4] This rule is, however, only permissive and not mandatory so as to exclude the application of general rule in O.6, R.14, which applies to companies as well as to individuals. A company can, therefore, authorise some other person to sign on its behalf.[5] But signature of an attorney of the Secretary or Director would not be sufficient.[6] When as per the Articles of Association of a company a suit on behalf of the company has to be filed with the consent of Directors of the company but it was filed by the Secretary who had a general power of attorney from the Directors, the suit was held maintainable as the action taken by the secretary was approved by the Directors subsequently.[7] The person verifying a pleading on behalf

20 *Raja of Tomkuhi* v. *Braidwood*, 9 A 505.

1 *Barjeshwar* v. *Budhanuddi*, 6 C 268.

2 *Jardine Skinner* v. *Maharani Surnomyee*, 24 WR 215; *Pratap Chandra* v. *Kristo*, 8 C 885.

3 *Kastalino* v. *Rustomji*, 4 B 468.

4 O.29, R.1; *United Bank of India* v. *Naresh Kumar*, A 1997 SC 3.

5 *Bundi Portland Cement Co.* v. *Abdul Husain*, A 1936 Bom 418; *Calico Printers Association* v. *A.A. Karim*, 128 IC 557, 32 Bom LR 1305, A 1930 Bom 566; *South India Corporation* v. *State Trading Corporation of India Ltd. Cochin*, A 1970 Ker 138; *Judhister Prusty* v. *Koshal Transport Trading Co.*, (1971) 37 CLT 108.

6 *Osborne Garret & Co.* v. *Raisi*, 100 IC 450 (Sind); *Delhi and London Bank* v. *Oldham*, 21 C 60.

7 *Turner Morrison & Co. Ltd.* v. *Hungerford Investment Trust Ltd.*, (1972) 1 SCRW 887, A 1972 SC 1311.

of corporation must prove by affidavit his fitness to verify even though upon information or belief.[8] But there is nothing in the Code which makes it obligatory to state in the body of the plaint or by affidavit that the person signing or verifying is an officer able to depose to the facts of the case.[9] Where a plaint was signed and verified by the secretary who was empowered by the Articles of Association to do so and an averment to that effect was made in the plaint, a separate affidavit was held not necessary.[10]

This rule does not apply to unregistered companies as they can sue only in the names of their members, but it does apply to foreign corporations.[11] In case of partnership firms the pleading may be signed and verified by any one of the partners,[12] or as provided in O.6, R.14 or 15 by any other person in the circumstances stated above.

In a suit by or against the government the pleading shall be signed by such person as the government may, by general or special order, appoint in that behalf, and shall be verified by any person whom the government may so appoint and who is acquainted with the facts of the case.[13] In a suit by or against a Bank represented by the concerned Branch Manager, the pleadings may be signed and verified by the Branch Manager.[14]

Mode of Verification : The proper mode of verification is that the person verifying shall specify, at the foot of the pleading, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge, and what he verifies upon information received and believed to be true. The verification shall be signed by the person making it and shall state the date on which, and the place at which it was signed.[15] Where the number of the plaintiffs exceeds more than one, any one of them can

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8 *International C.C.Co.* v. *Mehta & Co.*, 105 IC 568, 31 CWN 1030, A 1927 Cal 786; *Port Canning Co.* v. *Dharnidhar*, 9 CWN 608.

9 *Bundi Portland Cement Co.* v. *Abul Hussain*, A 1936 Bom 418.

10 *Gopalganj L. Bhandar Ltd.* v. *Purna Chandra*, 40 CWN 930.

11 *Singer Manufacturing Co.* v. *Baij Nath*, 30 C 103.

12 O.30, R.1 (2); *V.O. Devassy* v. *Periyar Credits*, A 1994 Ker 405.

13 O.27, R.1.

14 *Umesh Chandra* v. *State Bank of India*, A 1987 Orissa 67; *State Bank of India* v. *Kashmir Art Printing Press*, A 1981 P & H 188, (1981) 83 PLR 300.

15 O.6, R.15.

verify the plaint.[16] The names of the person from whom information is received, may or may not be disclosed.[17] A verification in the following words was held to be bad: "To the extent of my knowledge, the purport of this is true",[18] "contents of paras 1-11 above are true to the best of my knowledge and instructions".[19] A verification to the effect that "the contents are substantially true" is not sufficient.[20]

Defects of Signature or Verification : Want of signature or verification or any defect in either will not make the pleading void, and a suit cannot be dismissed nor can a defence be struck out simply for want of, or a defect in the signature or verification of the plaint or written statement,[1] as these are matters of procedure only.[2] It has been treated to be a mere irregularity and curable by amendment.[3] The defect may be cured by amendment, at any stage of the suit,[4] and when it is cured by amendment, the plaint must be taken to have been presented on the date on which it was originally presented, and not on the date on which it was

16 *R.P. Nautiyal* v. *Chandra Mohan*, A 1985 All 118; *Bibi Asghari* v. *Md. Kasim*, A 1951 Pat 323.

17 *Rivers Steam Navigation Co.* v. *Khaita*, 38 CWN 551, 34 C 632, 53 CLJ 391.

18 *Girdhari* v. *Kanhaya Lal*, 15 A 59.

19 *Mt. Sobhag Kunwar* v. *Jugraj*, A 1949 Ajmer 37.

20 *Waggoner* v. *Brown*, 8 How Pr. 212.

1 *Chandra Sekhar Rai* v. *State*, A 1984 Pat 167; *Arunachellum* v. *Prahhaya*, 1912 MWN 1207; *Basdeo* v. *Smidt*, 22 A 55; *Nandlal* v. *Sarkoni*, 165 PWR 1911; *Rajit* v. *Katesar*, 18 A 396; *Rustom* v. *Tara*, 11 CWN 871; *Fateh Chand* v. *Mansab*, 20 A 442; *Mt.Sobhag Kunwar* v. *Jugraj*, A 1949 Ajmer 37; *All India Reporter* v. *Ramachandra*, A 1961 Bom 292; *Karan Singh* v. *Ram Rachpal Singh*, A 1977 HP 28; *Scindia Potteries Ltd* v. *Srichand*, 1996 AIHC 5005 Delhi.

2 *Wali Md.* v. *Ishakali*, 1931 ALJ 772, A 1931 All 507, 134 IC 26; *E.A. Zippel* v. *K.D. Kapur*, 1932 Sind 9, 139 IC 114.

3 *Makhu Lal* v. *Bachcha Pathak*, A 1992 All 358; relied on *Muraka Radhey Shyam Ram Kumar* v. *Roop Singh Rathore*, A 1964 SC 1545; *I.T.C. Ltd.* v. *Phurba Lama*, A 1992 Sikkim 34; *Nand Kishore* v. *Bhagi Kuer*, A 1958 All 329; *Gauri Kumari* v. *Commissioner I. Tax*, A 1960 Pat 270; *Purusho Hamidwallah Bhai & Co.* v. *Manilal & Sons*, A 1961 SC 325; *Karan Singh* v. *Ram Rachpal Singh*, A 1977 HP 28; *Kailash Singh* v. *Hiralal*, A 1994 Gau 12.

4 *Basdeo* v. *Smidt*, 22 A 55; *Nandlal* v. *Sarkoni*, 165 PWR 1911; *W Johnston* v. *Sir Rameshwar Singh*, 104 IC 747 Pat; *Shibdeo* v. *Ram Prasad*, 46 A 637, 22 ALJ 690; *Subbiah* v. *Sankarapandious*, A 1948 Mad 369, 1948 MWN 190, 1948 MLJ 227; *Dinbandhu* v. *Jadumoni*, A 1954 SC 411.

amended.[5] If the defect is discovered in appeal, the Appellate Court may, if it thinks fit, have the defect removed, but where the defect is such that it does not affect the merits of the case, no notice of it need be taken.[6]

When an objection to such defect is taken, the court should not frame an issue on the point, but should get the defect at once removed. Where, however, it is shown that the suit was not filed with the knowledge of the so called plaintiff, it should be dismissed and the mere fact that a pleader, having general power of attorney to sign plaints for him, has signed the plaint will not make it a valid document.[7]

An objection that a plaint has been signed by an incompetent person, if not raised before the trial court cannot be allowed to be raised before the appellate Court.[8] Where the plaint was not signed and verified properly, but the plaintiff in the witness box proved his case, it was held that the plaint could not be rejected on account of want of signatures and proper verification.[9]

While construing the various procedural provisions the courts should always bear in mind that"as far as possible, no proceeding in a court of law should be allowed to be defeated on mere technicalities".[10] As aptly observed by Justice Vivian Bose dealing with the Code of Civil Procedure:

"It is something designed to facilitate justice and further its ends; not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should, therefore, be guarded against (provided always that justice is done to *both sides*), lest the very means designed for the furtherance of justice be used to frustrate it."[11]

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5 *Ram Gopal* v. *Dhirendra*, 101 IC 573, 31 CWN 397; but see, *Kehar Singh* v. *Mahant Avtar Singh*, 69 Punj LR 238;

6 Section 99, C.P.C.; also see, *B.R. Sharma* v. *Nanank Chand*, A 1967 All 487; *Subbiah* v. *Sankara*, A 1948 Mad 369.

7 *Mahabir* v. *Shah Wahid Alam*, 11 AWN 152.

8 *Clara Auroio de Branganca* v. *Sylvia Angela Alvares*, A 1985 Bom 373.

9 *Kailash Singh* v. *Hira Lal Dey*, A 1994 Gau 12.

10 *Ghanshyamdas* v. *Dom. of India*, (1984) 3 SCC 46 (para 18).

11 *Sangram Singh* v. *Election Tribunal*, A 1955 SC 425.

Chapter VI

PARTICULARS

Particulars and their Importance : In every pleading a certain amount of detail is necessary to ensure clearness and to prevent the other party from being taken by surprise. The term "Particulars" has not been defined in any enactment. As observed in the election case of *Hari Das* "shortly stated, *'Particulars' may be described as the details of the case set up by the party.*"[1] No precise rules about the degree of particularity required in any case can be laid down, but as much certainty and particularity should be insisted on as is reasonable; and a party is entitled to a fair outline of the case of his opponent, and to have any and every particular that will enable him to know his opponent's case and to prepare himself accordingly,[2] though he is not entitled to disclosure of the evidence of his opponent.[3] It would however, be no excuse for withholding particulars that they will also disclose some portion of the evidence.[4] For instance, in suit for infringement of a trade mark on the allegation that the use of the trade mark by the defendant had in fact induced "diverse persons" to purchase defendant's goods as the plaintiff's goods, the plaintiff is bound to disclose the names of such persons.[5] The object of giving particulars is to narrow down issues, by limiting the inquiry at the trial to matters set out in them, and a party is not entitled to go into any matters not included in his particulars.[6] It is, therefore, the duty of every pleader to apply for further particulars of the pleadings of his opponent, where no particulars are given or they are not given in sufficient detail, even though he can make a shrewd guess as to what is really meant, because he will thereby be able not only to prepare himself with his defence, but also to pin down his adversary to

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1 *Hari Das* v. *Hira Lal*, 4 ELR 466.

2 *Thorp* v. *Holdsworth*, (1876) 3 Ch D 637; *Philipps* v. *Philipps*, (1878) 4 QBD 117; *Saunders* v. *Jones*, (1877) 7 Ch D 113; *Gauri Shanker* v. *Manki Kunwar*, 21 ALJ 571, 45 A 624, 74 IC 466, A 1924 All 17 (DB).

3 *Creet* v. *Gangaraj*. 17 IC 214, A 1937 Cal 129.

4 *Marriott* v. *Chamberlain*, (1886) 17 QBD 154; *Zierenberg* v. *Labouchere*, (1893) 2 QB 183; *Bishop* v. *Bishop*, (1901) 70 LJ 93.

5 *Humphries Co.* v. *The Taylor Drug Co.*, (1888) 39 Ch D 693.

6 *Wooly* v. *Broad*, (1892) 2 QB 317.

a definite case.[7] He is entitled to do this under O.6, R.5. If particulars are not given, and neither the opposite party applies for them nor does the court insist on their being set out in the pleading, the party pleading would be entitled to give evidence of all and any facts which support his allegation.[8]

It is the duty of the court to insist that full particulars should be given in the pleading. In the absence of proper pleadings under Sec. 70, Contract Act, the plaint should not be entertained.[9] In a case in which only general allegation of immorality were made without giving sufficient particulars, the High Court held that it was the duty of the Judge to have the whole general paragraph struck out.[10] But neither the right of the defendant nor the duty of the court to call for particulars, if necessary, can be any excuse for a plaintiff not giving full particulars in his plaint. In a suit for public right when the plaintiff had not given details of the special damage suffered, the Calcutta High Court refused to listen to the argument that the defendant could have got the information if he had applied for particulars.[11] Where the defendant merely pleads that the donor never executed gift-deed in favour of the plaintiff, but does not plead that because of either physical or mental disability or because of illiteracy, the donor did not have any knowledge about the execution of the gift-deed, there is total absence of pleading of fraud, undue influence and/or misrepresentation, and in the absence of the pleadings it is not open to the court to allow any evidence on that score.[12]

(As to when particulars should be ordered and when refused see also chapter VIII, post)

How far it is necessary to set out details of time, place, account, etc., in the pleadings, is a matter which a pleader should carefully consider.

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7 *Nathu Ram* v. *Kalu*, 171 IC 121 Nag.

8 *Hewson* v. *Cleeve*, (1904) 2 Ir. T 536.

9 *Union of India* v. *Sitaram Jaiswal*, A 1977 SC 329; *Devi Sahai Palliwal* v. *Union of India*, A 1977 SC 2082; see also, *Bal Gangadhar Tilak* v. *Sri Srinivas Pandit*, 39 B 441, 22 CLJ 1, 19 CWN 729, 13 ALJ 570, 29 MLJ 34; *Gauri Shankar* v. *Manki Kunwar*, 21 ALJ 571, 45 A 624, 74 IC 466.

10 *Jagdish* v. *Hazarilal*, 140 IC 585, 1932 ALJ 671.

11 *Raj Chandra* v. *Mahim Chandra*, A 1936 Cal 549, 91 IC 728; see also, *Sitaram* v. *Hari Ram*, 165 IC 24, 40 CWN 913.

12 *Santanu Kumar Das* v. *Bairagi Charan Das*, A 1995 Ori 300.

Experience and common sense, more than any hard and fast rules of law, can best teach him this. In the Code of Civil Procedure, it is laid down that particulars must be stated when fraud, breach of trust, wilful default or undue influence is pleaded. In other cases, when more particulars than are exemplified in the Forms in Appendix A are necessary, they are to be stated.[13]

It must be clearly understood that under 'particulars' only such facts as are the details of the facts stated in the pleading can be set out, and no new material altogether based on an entirely different cause of action can be introduced, as that would not be permissible under O.6, R.7.[14] The distinction between *particulars of material fact* and *material fact itself* is fine one, but is very important and should not be lost sight of. "Material Fact" is an essential element of the cause of action and if any material fact is omitted, the plaint is bad and can be rejected under O.7, R.11 (a). Particulars are the details of material fact which are necessary for the other party to know to prevent him from being taken by surprise and to narrow the issues. An omission to give such particulars does not necessarily entail rejection of the plaint but the court may make an order for submission of necessary particulars. But there are certain particulars without which an allegation of material fact does not amount to a good averment of that fact at all, e.g. an allegation of fraud. The omission of necessary particulars will make the averment of a material fact like fraud bad and liable to be struck out altogether. These particulars are different from those required to narrow the issues or prevent surprise, absence of which does not entail rejection of the pleading but gives the other party a right to ask the court to order particulars.

The rule relating to particulars has assumed greater importance in election cases. Sec.123 of Representation of Peoples Act, describes various corrupt practices and under the law particulars of even corrupt practices alleged have to be given in the election petition. An election petition is, however, construed strictly and unless material facts have already been stated in the petition the same cannot be allowed to be introduced subsequently, *i.e.*, after the expiry of the period of limitation

13 O.6, R.4.

14 *Mehnga* v. *Maya Singh*, A 1937 Lah 795.

for filing a petition in the garb of furnishing particulars. However, if material facts are already there the particulars can be allowed or required to be furnished later.[15] The Supreme Court while discussing the importance of particulars observed :

"There can be no reasonable doubt that the requirement of full particulars is one that has to be complied with, with sufficient fullness and clarification so as to enable the opposite party to meet them fairly and they must be such as not to turn the inquiry before the tribunal into a rambling and roving inquisition".[16]

Certainty as to Time : Dates where necessary should always be given, e.g. date of notice, date of rent or debt falling due, date of default or breach where the cause of action is based on it, date of execution of bond or promissory note, date of sale of each consignment of goods in suit for price of goods supplied.

Places : Places should be definitely mentioned, so that they can be properly indentified. Particulars of the property about which a claim is made should be clearly specified, so that there may be no mistake about its identity and no difficulty may be experienced at the time of execution of the decree. If it is a house, it should be described by its number, name of the street, or by the boundaries or by numbers in the *Khasra* or other village record. If it is an agricultural field, full specification of it as given in the village records(e.g. number of *Khatauni* or *Khasra*, etc.,) should be given.[17] When area of property is mentioned the area according to the notations used in the record of settlement or survey should be stated,with or without, at the option of the party, the same in terms of the local measures.

Account : In a suit for money, particulars of the account by which the amount claimed has been arrived at, should be given. For instance, if

15 *Samant N. Balkrishna* v. *George Fernandes*, A 1969 SC 1201; *Hardwari Lal* v. *Kanwal Singh*, A 1972 SC 515; *Udhav Singh* v. *Madhav Rao Scindia*, A 1976 SC 744; *Manubhai* v. *P.M.Joshi*, A 1969 SC 734; *Ziauddin Bukhari* v. *B.R. Mehra*, A 1975 SC 1788; *Balwant Singh* v. *Prakash Chand*, A 1976 SC 1187; *Vatal Nagaraj* v. *R.D. Sagar*, A 1975 SC 349; *Zeliang* v. *Aju Newmni*, A 1981 SC 8; *Dhartipakar* v. *Rajiv Gandhi*, A 1987 SC 1577; *Ram Charan* v. *Bhola Shanker*, A 1987 All. 134; *Subhash Desai* v. *Sharad J.Rao*, A 1994 SC 1733; see also *Manohar Joshi* v. *N.P.Patil*, A 1996 SC 796.

16 *A. Bhikaji Keshao Joshi* v. *Brijlal Nandlal Biyani*, 10 ELR 357 SC.

17 O.7,R.3.

the suit is for the total of several items advanced at different times, each item with the date and amount should be specified. If a principal sum is claimed with a further sum as interest, full account of the calculation of interest should be given. If payments by defendant are credited the plaintiff must not merely name a lump sum, but must state the dates and items of the amounts credited. A mortgagee in possession admitting receipt of certain sums on account must give particulars of all sums received. But if a general account is claimed and the court agree that such an account must be taken, then no such particulars need be given.

Adultery: In the case of adultery, which is a charge of a very serious nature, the pleading should be specific, the particulars of the time, the date, the place of commission of acts of adultery must be specific so that the opponent can defend the case.

The charge of adultery is a serious charge and casts aspersion on the character of the spouse which affects the reputation of the spouse in the society. It is to be established beyond doubt though it may be difficult to find direct evidence for establishing it. The spouse against whom the charge is made should be aware of the precise allegation so as to be able to effectively answer the same. In case the charge is vaguely made, without furnishing the particulars, it would not be possible for the spouse to do so.[18]

Misconduct : General : Misconduct consists of various things such as fraud, undue influence, coercion, collusion, misrepresentation, mistake, negligence, breach of trust, etc. Although most of these are cognate vices and may in part overlap in some cases, they are, in law, distinct categories and are in view of O.6, R.4 read with O.6, R.2 required to be separately pleaded with specificity, particularity and precision.[19] It is no excuse for the omission to say that the opponent must himself be aware of that fact. Your opponent is entitled to know the outlines of the case and to bind you to a definite story so that he may be able to meet it. Their Lordships of the Privy Council have enjoined all judges to compel a litigant who pleads fraud and such other misconduct on the part of the other party to place on

18 *Paravati* v. *Shiv Ram*, A 1989 HP 29.

19 *Afsar Sheik* v. *Soleman*, A 1976 SC 163; *Bishnu Dev Narain* v. *Seogeni Rai*, A 1951 SC 280; *Kanagarathinam* v. *Perumal*, A 1994 Mad 247.

record precise and specific details of those charges and observed that cases of such type would be simplified if this practice is strictly observed and insisted upon by courts, even if no objection is taken by the opposite party.[20]

O.6, R.4 requires that particulars of items, if necessary, should be stated in the pleadings. This will bring about precision in pleading; prevent surprise to the other party and ensure a fair trial. A bare denial of contract is not denial of the legality or sufficiency in law (O.6, R.8). It is not permissible to introduce by way of particulars a plea of misconduct other than that raised in the pleadings.[1] Some acts of misconduct relate merely to the state of mind of the person charged and some to specific acts of commission or omission. In the case of the former, particulars of the state of mind may not be necessary to be pleaded because it is impossible to probe into the mind of the person. O.6, R.10 lays down that wherever it is material to allege malice, fraudulent intention, knowledge or other conditions of mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred. But in the case of the latter, it is necessary to state particulars of the misconduct on the part of the other party. There are many cases in which actions of public bodies or officers are challenged on the ground of *mala fides*. General and broad allegations of lack of *bona fide* are not sufficient.[2] Something more specific, more direct and more precise is necessary to sustain such a plea. It is also well settled that it is not permissible to introduce by way of particulars a plea of misconduct other than that raised in the pleadings.

Fraud: Fraud should be pleaded with the greatest possible care and party pleading it must fully realise his responsibility for doing so. Counsel should preferably refuse to plead fraud without having full and definite instructions in writing from their clients, and even then they should warn their clients before-hand of the risk the latter runs by pleading such a

20 *Bharat Dharm Syndicate Ltd.* v. *Harishchandra*, 41 CWN 476, A 1937 PC 146.

1 *Brijendranath Srivastava* v. *Mayank Srivastava*, A 1994 SC 2562; *Union of India* v. *Pandurang Kashinath More*, A 1962 SC 630; *Swarnalatha Devi* v. *Krishna Iron Industries and Metal Works (P) Ltd.*, A 1974 Cal 393.

2 *Kosaraja Venkatta* v. *Govt. of Andhra Pradesh*, A 1965 AP 425; *Kedarnath Bahal* v. *State of Punjab*, (1978) 4 SCC 336.

grave charge. A charge of fraud is a serious thing to bring against a man and it cannot be easily maintained in any court.[3] In our country, fraud and other allied charges are often very lightly pleaded. The words "fraudulently", "dishonestly", "wrongfully", "cunningly", etc., are frequently used to qualify the acts and conduct of the opposite party, without fully realising the exact and legal meaning of those words. A pleader must insist on full particulars and details of the alleged fraud being given, and should never plead that charge unless a clear case of fraud is made out from the facts supplied to him. Mere suspicion is not enough, there should be circumstances incompatible with honest dealing.[4]

Where fraud is alleged as a matter of an objective fact, O.6, R.4, applies and particulars must be given. But where a mental condition is alleged, such as fraudulent intention. O.6, R.10, will apply and no particulars need be given. Thus the question of bonafides is one of mental condition and is covered by O.6, R.10.[5]

Before drafting a plea of fraud, the definition of that word in the Contract Act (section 17) should be carefully read and it should be seen whether the facts to be alleged fall within that definition. If they do, and if it is decided to plead fraud, it should not be pleaded generally, for there is a well known rule of pleading expressed in the frequently quoted language of Lord Selbourne that "with regard to fraud, if there is any principle which is perfectly well settled, it is that general allegations, however strong the words in which they are stated, are insufficient even to amount to an averment of fraud of which any court can take notice".[6] Specific allegations, with full particulars as to what the fraud was, how, by whom,

3 *Le Lievre* v. *Gould*, (1893) 1 QB 491.

4 *Hansraj* v. *Dehra Dun Mussoorie Electric Tram Co.*, A 1940 PC 98, 187 IC 787; *K.Kanakarathnam* v. *A. Perumal*, A 1994 Mad 247; *Padmini Mishra* v. *Ramesh Chandra Mishra*, A 1991 Orissa 263; *Rakhal Chandra* v. *Prosad Chandra*, A 1926 Cal 73, 90 IC 2263 (DB).

5 *Dinbai Dinshaw Petit* v. *Dominion of India*, A 1951 Bom 72.

6 *Wallingford* v. *Mutual Society*, (1880) 5 App Cas 685; *Raj Narain* v. *Majlis Sahay*, 104 IC 821 Pat; *C.D. Lincoln* v. *Sheikh Noor Elahi*, A 1943 Oudh 192; *Bishundeo* v. *Sheogeni*, A 1951 SC 280; *Bharat Dharma Syndicate* v. *Harish Chandra*, 64 IA 143 (147); *Union of India* v. *Pandurang Kashinath More*, A 1962 SC 630; *Raja Srinivas* v. *S.D.O.,Mirzapur*, A 1962 All 590; *Kasturi Laxmileayamma* v. *Sabvitres Venkoba Rao*, A 1970 AP 440.

and when was it committed, should be given,[7] and if such details are not given in the plaint, in a case founded solely on fraud, it is liable to be rejected.[8] Where fraud is alleged, particulars thereof should be given and the allegations constituting fraud must be clear, definite and specific.[9] No oral evidence is admissible unless a specific pleading of fraud is made in the plaint.[10] Particulars have to be furnished of the plea of fraud in accordance with O. 6, R. 2 and it is not permissible to introduce by way of particulars a plea of fraud or misconduct other than that raised in the pleadings.[11] The same rule applies where fraud is relied upon as a defence in the written statement.[12]

The proper way of pleading fraud is to set out all the acts and representations alleged to be fraudulent in their full details and then to state that those acts were done with a malafide intention of committing fraud. It should be mentioned whether the representations were oral or in writing. If oral, the substance of such representations should be given, alleging the date and place when and where they were made, and the name of the person making them, and that of the person to whom they were made. If they were in writing, the document or documents containing them should be clearly identified in the particulars.[13] For instance, in a suit for declaration of title to certain property entered in the record of rights as that of the plaintiff's guardian, the bare allegation that the entry was brought about by the guardian fraudulently was held not sufficient to raise a question of fraud, and it was pointed out that it must be alleged who committed the

7 *Annada* v. *Atul*, 23 CWN 1045, 54 IC 197, 31 CLJ 73; *D. Weston* v. *Peary Mohum Das*, 40 C 898, 23 IC 25, 18 CWN 185; *Rajkumar* v. *Gobind*, 14 IC 53, 17 CWN 524; *Lachmi Narayan* v. *Kishan Kishore*, 38 A 126, 14 ALJ 25, 33 IC 913; *Ghaman* v. *Kanhiya*, 15 PWR 1915, 26 IC 426, 121 PLR 1915; *Punjab Commercial Syndicate* v. *Punjab Cooperative Bank*, A 1926 Lahore 96, 6 Lah 512, 92 IC 322 (DB); *Lloyds Bank* v. *J.E. Guzder*, 56 C 868; *Rattanasabapathy* v. *Ammakannammal*, 57 MLJ 609; *Maung Hla* v. *M.N.S. Chattyor*, 145 IC 118, A 1933 Rang 153; *Mate Nande* v. *Dal Chand*, A 1948 Nag 170; *Union of India* v. *Motilal*, A 1962 Pat 384.

8 *Ganga Ram* v. *Tiluckram*, 15 C 533 (PC).

9 *Padmini Mishra* v. *Ramesh Chandra Mishra*, A 1991 Orissa 263; *Dr. Lakhi Prasad Agarwal* v. *Nathmal Dokania*, A 1969 SC 583 referred to.

10 *Raghunath Tiwary* v. *Ramakant Tiwary*, A 1991 Pat 145.

11 *Brijendra Nath Srivastava* v. *Mayank Srivastava*, A 1994 SC 2562.

12 *Sheik Nasiruddin* v. *Ahmad Husain*, A 1926 PC 109.

13 *Gauri Shankar* v. *Manki*, 21 ALJ 571, 45 A 624.

fraud, that what was done by the guardian was done with fraudulent intention of defeating the plaintiff's rights, and that the Settlement Officer was misled by her act and was induced thereby to make an incorrect entry in the record.[14]

The plaintiff alleged that exparte decree was fraudulently obtained by the defendant by practising fraud upon the court. This was not considered sufficient and it was held that it is the duty of the plaintiff to specify the particulars of fraud in the plaint.[15] So, when the defendant is charged with making false entries in the account-books, the entries charged to be false and the nature of the plaintiff's objection to each of them should be specified.[16]

Unless fraud is thus clearly and specifically alleged it cannot be put in issue,[17] and it will not be considered enough that there are allegations in the pleading from which such a plea can be spun out.[18] But where the transactions speak for themselves and furnish evidence of a well thought out design, the plaintiff's omission to set forth the particulars and details of the conspiracy does not matter.[19] In a suit for possession of property purchased at an auction sale the only fraud the defendant pleaded was that there was collusion between the decree holder and the purchaser and that they had agreed to purchase the property at a low price but the Subordinate Judge framed an issue whether the purchaser had deliberately misrepresented the amount of a prior charge. The Bombay High Court held that the Subordinate Judge was not justified in raising this new case of fraud for the defendant.[20] An allegation of fraud should be made in the pleading and cannot be allowed to be made at a later stage of the suit,[1]

14 *Hare Kishna* v. *Umesh*, 2 Pat LT 528, 62 IC 373, A 1921 Pat 209, 6 PLJ 373 (FB).

15 *Quazi Talifiquo Rahman* v. *Sital Prasad Das*, A 1977 Gauhati 25.

16 *Newport Dry Dock Co.* v. *Paynter*, (1886) 34 Ch D 88.

17 *Khirode* v. *Janki*, 20 IC 753; *Manak Chand* v. *Girdhari*, 46 IC 342; *Narain Singh* v. *Sri Ram*, 108 IC 383 Cal; *Namdev Digamber* v. *Vijay Kumar Ram Chandra*, A 1963 Bom 244; *Julum Dhari Rai* v. *Debi Rai*, A 1965 Pat 279.

18 *Sankuni* v. *Nallappah*, 29 IC 482 (Mad).

19 *Nanhoo Beg* v. *Gulam Husain*, A 1950 Nag 50; *Subbamma* v. *Mohd. Abdul Hafiz*, A 1950 Hyd 55; *Ramji Mawji* v. *Valji Harji*, A 1950 Kutch 67; *Bishun Deo Narain* v. *Seogini Rai*, A 1951 SC 280.

20 *Dodasappa* v. *Pradhanappa*, A 1926 Bom 33, 91 IC 426, 22 Bom LR 1318 (DB).

1 *Govindaswami* v. *Ethirajammal*, 34 IC 1, 1916 MWN 180.

unless the party pleading it was not aware of the fraud, in which case he can set it up when he becomes aware of it.[2] Where, however, omission to refer to fraud in the plaint was due to mere oversight, the court allowed amendment of the plaint.[3]

The charges of fraud must be substantially proved as laid and when one kind of fraud is charged; another kind of fraud cannot, upon failure of its proof, be substituted for it,[4] nor is it proper for an Appellate Court to entertain a case of fraud other than the one specifically alleged in the pleading.[5] Mere suspicion is not enough.[6] For example, when a lady suing for cancellation of a sale deed executed by her, alleged that the defendants, who were her agents, got the deed executed by her without making her aware of the contents thereof, and that she did not get any independent legal advice and did not get any consideration, but proved that she had put her signature on blank sheets of paper, subsequently filled up without her knowledge and turned into a conveyance, it was held that she could not succeed.[7]

The general rule that fraud must be specifically pleaded would not, however, apply when the party aggrieved raises no objection and fights out the case as though the pleadings were in proper form.[8] Similarly, where there is an allegation of fraud, a specific allegation of undue influence based on the same facts is unnecessary.[9]

Undue Influence : This being a species of fraud should be pleaded with precision and unless a case of undue influence is made out in the pleadings, it cannot be investigated by courts.[10] This rule has been evolved

2 *Radha Kishan* v. *Wajib Ali Khan*, 3 OLJ 501, 36 IC 746, 19 OC 334.

3 *Muniswami* v. *Raja Gopala*, A 1928 Mad 759, 118 IC 763, 54 MLJ 644.

4 *Abdul Hasan* v. *Turner*, 11 B 620, 14 IA 111; *Ganga Ram* v. *Dwarka*, 14 AWN 6; *Nagendra* v. *Parbati*, 35 IC 339, 20 CWN 819; *Bansi Ram* v. *Secretary of State*, 35 IC 284, 20 CWN 638; *Satish Chandra* v. *Kalidasi*, 34 CLJ 529, 68 IC 577, 26 CWN 177, A 1922 Cal 203 (DB); *Mohd. Baksh* v. *Rawalpindi Club*, A 1955 Lah 222.

5 *Mt. Mira* v. *Sarvasi*, 23 M 227.

6 *Union of India* v. *Chaturbhai Patel*, A 1976 SC 712.

7 *Bansi Ram* v. *Secretary of State*, 35 IC 284, 20 CWN 638.

8 *Beni Madho* v. *Basanto Kunbi*, 35 IC 252 All.

9 *Narayan Bhat* v. *Akkerbai*, 33 IC 576, 18 Bom LR 27.

10 *Inder Chand* v. *Bidyadhar*, 60 IC 282, A 1921 Pat 45 (DB); *Ladli Prasad Jiwal* v. *Karnal Distillery*, A 1963 SC 1279; *Gouri Shankar* v. *Fakir Mohan*, A 1989

with a view to narrow the issue and protect a party charged with improper conduct from being taken by surprise. A plea of undue influence must, to serve the dual purpose, be precise and all necessary particulars in support of the plea must be embodied in the pleadings; if the particulars stated in the pleadings are not sufficient and specific, the Court should, before proceeding with the trial of the suit insist upon the particulars which give adequate notice to the other side of the case intended to be set up.[11]

The essential ingredients covering the three different stages for a plea of undue influence have to find place in the pleading. It must be stated how the person alleged to have exercised undue influence was in a position to dominate the will of, and exercise his influence over the party pleading, and that in fact he did influence the latter,[12] and thereby obtained an undue advantage. All the necessary and material facts of undue influence should be pleaded in support of the case set up.[13]

A general allegation, it was held, in the plaint that the plaintiff was a simple old man of 90 who had reposed great confidence in the defendant, was much too insufficient to amount to an averment of undue influence of which the High Court would take notice.[14] It is not sufficient merely to allege that the relations of the parties were such that one relied upon the other and the other was in a position to dominate the will of the first. It should further be alleged that such other person used his position to obtain an undue advantage.[15] Mere averment that opposite party exercised undue influence in the absence of precise facts, namely the nature of such influence,

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Orissa 201; *Syed Sultan Pai* v. *Syed Bikhu Sahib*, A 1986 AP 342; *Andmmal* v. *Rajeswari Vedachalam*, A 1985 Mad 321 (DB); *Kallanchil Padunhakkara Abdul Rahman* v. *Kunhi Muhammad*, A 1975 Ker 150; *Chirongi Lal* v. *Shanker Lal*, 1979 MPLJ 591.

11 *Ladli Parshad Jiwal* v. *Karnal Distillery Co. Ltd.*, A 1963 SC 1279; *Subhas Chandra Das* v. *Ganga Prasad*, A 1967 SC 878.

12 *Premnarayan* v. *Kunwarji*, A 1993 MP 162; relied on *Subhash Chandra* v. *Ganga Prasad*, A 1967 SC 878; *Shiddubai* v. *Nilapagauda*, 83 IC 616 (Bom); *KunhaminaUmma* v. *Special Tehsildar*, A 1977 Ker 41.

13 *K. Kanakarathnam* v. *A. Perumal*, A 1994 Mad 247.

14 *Afsar Sheikh* v. *Soleman Bibi*, A 1976 SC 163.

15 *Gouri Shankar* v. *Fakir Mohan*, A 1989 Orissa 201; *Poosathurai* v. *Kamriappa*, 55 IC 447, 43 M 546, 18 ALJ 343, 22 Bom LR 538 (PC); *Sanwal Dass* v. *Kuremal*, 10 Lah LJ 27, A 1928 Lah 224, 9 Lah 470, 109 IC 779 (DB).

the persons on whom it was exercised and the time and place of it, the pleadings fall short of the requirements in law.[16] In a case for setting aside a deed of gift on the ground of fraudulent representation, where the plaintiff in order to show that defendant could commit the fraud, alleged how he was in a position to exercise undue influence over the plaintiff, it was held by the Privy Council that no substantial case of undue influence was raised and the allegations in the plaint were only ancillary to the main charge of fraudulent misrepresentation.[17] Detailed facts on which the plaintiff relies should be given and it is not sufficient merely to raise an atmosphere of suspicion.[18]

The plea of undue influence should be clearly stated in sufficient detail. The allegation that P lived with D who was managing his affairs is not sufficient to infer that D was in a position to dominate the will of P.[19] The Supreme Court has held that the courts must scrutinise the pleading to find out that a plea has been made out and full particulars given before examining any case of undue influence.[20] As in the case of fraud, so in the case of undue influence, a party must be strictly confined to the statement of facts alleged by him as particulars and cannot make out another kind of undue influence.[1]

Coercion : Coercion is defined under section 15 of the Indian Contract Act as committing or threatening to commit any act forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain any property to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement. In order to find a person guilty of committing coercion, full particulars must be furnished; when a Court is asked to find that a person was threatened with death, it is necessary to give particulars as to the nature of the threat, the circumstances, the date, time and place in which it was administered and the name of the person threatening.[2] A mere suspicion or probability will

16 *Lalit Kishore Chaturvedi* v. *Jagdish Prasad Thada*, A 1990 SC 1731.
17 *Someshwer* v. *Tirbhuwan*, A 1934 PC 130, 149 IC 480.
18 *Chandravathi* v. *Janti Prasad*, 40 PLR 146, A 1938 Lah 333.
19 *Talengala Narayana Bhatta* v. *Narasimha*, A 1965 Ker 189.
20 *Subhas Chander* v. *Gavraya Pd.*, A 1961 SC 878.
1 *Suraj Baksh* v. *Ajudhia Singh*, A 1928 Oudh 330, 110 IC 91 (DB).
2 *Bishundeo Narain* v. *Seogeni Rai*, A 1951 SC 280.

not be sufficient to prove coercion as held by Privy Council.[3] The word "coercion" used in the general and ordinary sense is not controlled by the definition of the word in section 15 of the Indian Contract Act.[4]

Collusion : Collusion is a deceitful agreement or contract between two or more persons to do some act in order to prejudice a third person or for some improper purpose. It is undoubtedly a secret arrangement for which it is indeed difficult to get direct evidence. The charge of collusion, though easy to make, is difficult to substantiate. However, a general allegation of collusion implying some kind of fraud is not enough without particulars.[5]

Misrepresentation : In a suit for false and fraudulent misrepresentation, the plaint should state whether the alleged misrepresentation was oral or in writing, and when and where each of them was made. If in writing the relevant documents must be identified and disclosed. If oral, the substance of each and every part of the representation should be given stating as regards each one, the date, when and the place where and the person by whom the said representation was made.[6]

Mistake : A mutual mistake such as would render a contract void within the meaning of section 20 of the Indian Contract Act, depends upon the facts and particulars pleaded and proved and where the plea is not made out it cannot be allowed.[7] Clear evidence of mistake, common to both the parties, must be alleged and proved.[8]

Negligence : In an action for negligence, the plaintiff must give full particulars of the negligence complained of and of the damages he has sustained.[9] Without a pleading and proof, negligence cannot be

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3 *Motilal Upathya* v. *Jaggurnath*, 1836 - 5 WRPO 25.

4 *Kanhyalal* v. *National Bank of India*, ILR 40 Cal 598 (PC), 40 IA 56.

5 *Varanasaya Sanskrit Vishwavidyalaya* v. *Dr. Rajkishore Tripathi*, A 1977 SC 615.

6 *Gowrisankar* v. *Monkey Kamwar*, ILR 45 All 624; *Padma* v. *Kripasindhu*, A 1986 Orissa 97.

7 *Jothi Prasad Singh* v. *Samuel Henri Seddon*, A 1940 Pat 516.

8 *Takar* v. *Bennett*, 1887-38 Ch D 109.

9 *Fowler* v. *Lanning*, 1959 (2) WLR 24; *Prafulla Ranjan Sarkar* v. *Hindustan Building Society Ltd.*, A 1960 Cal 214.

countenanced and the decree for damages cannot be awarded.[10] The plaint must clearly allege the duty enjoined on the defendant with the breach of which he is charged.[11] In a case of collision, the plaintiff must state when and where the accident took place and the particular act of negligence and give details of the loss and expenses incurred.[12] In cases in which negligence is pleaded, full details must be given of the acts which constitute negligence[13] or from which negligence may be presumed on the application of the doctrine of *res ipsa loquitor*.[14] The *maxim res ipsa loquitor* is a principle which aids the court in deciding as to the stage at which the onus shifts from one side to the other.[15] Where negligence arises out of breach of contract or duty, it is necessary to state the nature of contract broken, the circumstances in which the performance of the contract by one party or the other was expected, the degree of care and attention which, in the ordinary course, was expected to be shown by the parties, the circumstances under which and the reasons for which the failure to show due diligence occurred, are all material particulars which would be relevant before a judicial finding could be given on the plea of negligence.[16] It is not open to the plaintiff to allege and seek to prove one kind of negligence and then ask the court of appeal to find negligence of another kind.[17] Again in cases where a statutory notice such as one under section 80 of the Code of Civil Procedure is mandatory in order to sustain a cause of action for liability on the Railway administration, it is necessary to give in the statutory notice itself all the necessary particulars before a charge of negligence can be effectively maintained and thus enable the defendants to decide whether the claim should be accepted or not.[18]

10 *Balak Glass Emporium* v. *Union of India*, A 1993 Ker 342; See also *Trojen* v. *Nagappan Chettiar*, A 1953 SC 235; *Govind Prasad* v. *Bari Dutt Sastri*, A 1977 SC 1005.

11 *Gautret* v. *Egerton*, 1867 (2) CP 371.

12 *Watson* v. *North Metropolitan Tramways Co.*, 1886-3 TLR 273; *Martin* v. *Teggart*, 1906 (2) Ir.R. 120.

13 *Gautret* v. *Egerton*, 1867 (2) CP 371.

14 *Pushpabai Parshottam Udeshi* v. *Ranjeeth Ginning and Pressing Company*, A 1977 SC 1735; *Basthi Kasim Sahib* v. *Mysore SRT Corporation*, A 1991 SC 487; *Jaghir Kaun* v. *State of Punjab*, (1995) 2 Punj LR 343 P&H.

15 *Sayed Akbar* v. *State of Karnataka*, 1980 ACH 38 (SC).

16 *New Marine Company Pvt. Ltd* v. *Union of India*, A 1964 SC 152.

17 *Raymond Lincoln* v. *Alice Paupinal*, A 1932 PC 95.

18 *Sahi Vanaspati Traders* v. *Union of India*, A 1966 All 333.

Medical Negligence : Medical negligence is a tortious act which is actionable and aggrieved party can avail the alternative remedy under Consumer Protection Act 1986.[19] The medical opinion may differ with regard to the course of action to be taken by a doctor treating a patient but as long as the doctor acts in a manner which is acceptable to the medical profession and the court finds that he has attended on the patient with due care, skill and diligence and if the patient still does not survive or suffers a permanent ailment, it would be difficult to hold the doctor guilty of negligence.[20] A towel was left inside a woman's peritonial cavity while she was operated for sterilisation in a Government Hospital causing peritonitis which resulted in her death and the conclusion of negligence was drawn against the doctors by applying the principle of *res ipsa loquitor* and the Government was held vicariously liable.[1]

Breach of Trust : In case of breach of trust, facts showing how the opposite party came to hold the position of trust, what were the terms of that trust, what acts he did which amounted to breach of trust, must be pleaded. In an action for breach of trust, the acts complained of are to be particularised to a point at which the defendant knows not merely generally but in detail what he has to meet.[2] It is not sufficient to allege that the defendant had in various ways misapplied the rents and profits of leasehold which he had received on behalf of the plaintiff and has committed breach of trust.[3] As a matter of procedure, acts of breach of trust, both positive and negative (wilful default) must be pleaded at the outset unless the plaintiff is deprived of access of the accounts of the Trust. If the trustee refuses to show the accounts, a beneficiary has a right to sue for an account and be allowed to formulate his charges after inspection of his accounts; otherwise, he must set out the charges at the outset or at any rate before the issues are framed.[4]

Miscellaneous Acts of Misconduct or Improper Conduct : The word 'misconduct' literally means wrongful conduct or improper conduct.[5]

19 *Indian Medical Association* v. *V.P. Shantha*, A 1996 SC 550.

20 *Dr. Laxman* v. *Dr. Trimbak*, A 1969 SC 128; *A.S. Mittal* v. *State*, A 1989 SC 1570; *Poonam Verma* v. *Ashwin Patel*, A 1996 SC 2111.

1 *Achut Rao Maribhau Khodwa* v. *State of Maharashtra*, A 1996 SC 2377.

2 *Rathnasabapathi* v. *Amma Kannammal*, ILR 1930 Mad 783.

3 In re *Austich*, 33 WLR 557.

4 *Shirimbai Dinshaw* v. *Navroji Pestonji*, A 1936 Bom 30.

5 *N.M. Roshan Kumar Karrin* v. *M & S.M. Railway*, ILR 59 Mad 789, A 1936 Mad 508.

Misconduct is something more than mere negligence and intentional doing of something which the doer knows to be wrong or which he does recklessly not caring what the result may be.[6] A mere clerical error would not possibly amount to misconduct which implies some degree of *mens rea* on the part of the person concerned or at any rate at a very grave degree of negligence or serious failure to carryout instructions or comply with regulations.[7] If an Advocate is guilty of conduct which is not becoming on the part of the Advocate, he is, to that extent, guilty of professional misconduct. When an Advocate spoke across the table to another Advocate when arguments were going on and that too about the Magistrate himself, it is not consonant with the high tradition of professional conduct.[8]

Misconduct in office may be defined as unlawful behaviour or neglect by a public officer by which the rights of a party have been affected. Gross or habitual negligence in the performance of duty may not involve *mens rea* but may still constitute misconduct for disciplinary proceeding.[9] Misconduct of promoters or directors as understood in the Companies Act means not misconduct of every kind but such as produces pecuniary loss to the company by misapplication of its assets or other acts.[10] In pleadings, a general allegation of misconduct is not sufficient. Where the defendant justified his action in dismissing the plaintiff from service on the ground of misconduct, specific acts of misconduct should be averred and proved.[11] However, where specific evidence on the point in dispute is exclusively in the hands of one party, it is not reasonable to insist upon the other party giving definite particulars of misconduct which an examination of that evidence alone would disclose.[12] Where an improper conduct is alleged, it must be set out with full particulars. A plaintiff cannot however complain, if general allegations of improper conduct made by him in the

6 *Dominion of India* v. *Ado Shah Akhar Shah*, A 1957 Pat 219; *Shivnath Rai Ram* v. *Amirt Banaspathy Co.*, A 1965 SC 1666.

7 *Gordhandas* v. *Governor General in Council*, A 1957 Punj 196.

8 *Subba Reddy* v. *Ramappa*, A 1954 Mad 318.

9 *Union of India* v. *Ahamed*, A 1979 SC 1022.

10 *Barium Chemicals Ltd.* v. *Company Law Board*, A 1967 SC 295.

11 Saunders & Jones, 1877 – 7 Ch. Div. 435.

12 *Pervala Ramakrishnaiah* v. *Pandri Satyananandan*, A 1932 Mad 284.

plaint are answered by equally general allegations in the written statements.[13]

The following are instances of some other cases in which it is necessary to give particulars :

I. *Suit for Accounts :* Particulars should be given as to how the defendant is an accounting party, e.g., that he is a mortgagee in possession or an agent or managing co-sharer. It is not sufficient to say merely that the defendant is an accounting party. It should also be alleged how the particular position of the defendant as an accounting party arose, e.g., if he is an agent, when and how he was appointed agent, whether verbally or by a written agreement; if he is a mortgagee, the date of the mortgage-deed should be specified.

II. *Adoption :* It is not sufficient to say that A is the adopted son of B, but the party setting up an adoption should give particulars as to the person who adopted, to whom the adoption was made, the person adopted and his relationship with the adopter and the person who gave in adoption. It is not necessary to plead that all ceremonies necessary and essential were performed.[14] In the absence of consent of the living wife, adoption cannot be said to be a valid adoption.[15] If there is a written statement containing bare denial of adoption, it will be taken to imply a denial only of the fact of adoption and not its legal validity.[16] Where the validity of adoption is challenged, the grounds of such invalidity must be pleaded.[17]

III. *Adverse Possession :* It is not sufficient to plead that a party has been in adverse possession for over 12 years. It should be definitely alleged how and when adverse possession commenced. What was the nature of his possession and whether the fact of his adverse possession was known to the real owner.[18] As between co-owners or co-sharers: there must be a plea and evidence of open assertion of hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other. Once possession of a co-owner or a co-sharer has become adverse as a result of ouster, a

13 *Union of India* v. *Pandurang Kashinath More*, A 1962 SC 630.
14 *Sital Prasad* v. *Ram Prasad*, A 1943 Nag 321.
15 *Kashibai* v. *Parwati Bai*, (1995) 6 SCC 213, 1995(3) CCC 565 (SC).
16 *Maroti Bansi* v. *Radhabai*, A 1945 Nag 60.
17 *Madhavrao* v. *Netram*, A 1957 M..B. 179.
18 *R.M. Dawar* v. *Ganga Saran Sharma*, A 1993 Delhi 19; *Rosily Mathew* v. *Joseph*, A 1987 Ker 42.

mere assertion of joint title by dispossession of co-owner or a co-sharer would not interrupt running of adverse possession. He must actively and effectively break up the exclusive possession of his co-sharers or co-owners by re-entry upon the property or by resuming possession in such a way as it is possible to do.[19] Possession of one co-owner is not by itself adverse to the other co-owner. On the contrary, possession by one co-owner is presumed to be a possession of all the co-owners unless it is established that a possession of the co-owner is in denial of the title of the other co-owners and by excluding them. Ouster is an unequivocal act of assertion of title. There has to be open denial of title to the parties who are entitled to it.[20] Adverse possession has to be expressly pleaded and proved. It cannot be set out simply in the course of trial and cannot rest on mere surmises.[1] Where the party's claim is based on section 53-A of the Transfer of Property Act, it is evident that he admits by implication that his possession is lawful under the agreement and the plea of adverse possession would not be available to him.[2] No amount of proof can substitute pleadings which are the foundation of the claim of adverse possession of a litigating party.[3] Adverse possession must be pleaded, put in issue and evidence should be let in, opportunity to refute the case must be made out by the party and availed by the other party. It cannot be allowed to be flung as a surprise on an unsuspecting party for the first time in appeal.[4]

IV. *Agreement :* Dates and names of parties to, and consideration of, the agreement, and whether it was in writing or oral, should be mentioned. In case it was in writing, the document should be properly identified. If the agreement is implied, the conduct, acts, conversation, or letters from which it is to be inferred should be indicated with sufficient accuracy, though it is not necessary to set them out in detail.[5] In a suit for breach of an agreement the exact condition broken and the manner of breach should be clearly specified.[6]

V. *Antecedent debt:* Where a transfer of coparcenary property by

19 *Shambu Prasad Singh* v. *Mst. Toom Kumari*, A 1971 SC 1337.
20 *Syed Shah Gulam Mohamed* v. *Syed Ahmed Moideen*, (1971) 1 SCC 597.
1 *Karmega Kone* v. *Udayar Kone*, (1979) 1 MLJ 419.
2 *Mohan Lal* v. *Mira Abdul Gaffur*, A 1996 SC 910.
3 *Abubaker Abdul Inamdar* v. *Abdul Inamdar*, A 1996 SC 112.
4 *Ratnaswamy Mudaliar* v. *Rasu*, 2000 (2) LW 540.
5 O.6, R.12.
6 *Jamshed* v. *Kunji Lal*, 1938 NLJ 392, A 1938 Nag 530.

a Hindu father is sought to be justified on the ground that it was made in lieu of antecedent debt, it is not sufficient merely to say so, but full particulars of the antecedent debt must be given, viz., the amount and nature of the debt, the name of the creditors, the date on which the debt was taken and how it was secured.

VI. *Benami:* Facts showing how the party pleading or the opposite party came to be *benamidar*[7] should be pleaded, e.g., who supplied the consideration and obtained possession, the relationship between them or other motive, if any, for giving the transaction a *benami* character, the conduct of the parties in dealing with the property after the sale with whom the custody of title deeds remained.

Benami Transactions (Prohibition) Act 1988 (Act 45 of 1988) is a piece of prohibitory legislation and it prohibits transactions subject to certain exceptions; makes transactions punishable. The Act is not retrospective.[8] The prohibition does not apply to purchase of property by a person in the name of his wife or unmarried daughter.[9] The provisions of the Act are not applicable to a decree passed legally and validly prior to the coming into force of the Act.[10]

Where an agent employed to purchase property for the benefit of the principal, purchases the property in his own name, the property so purchased is for the benefit of the principal and the suit by the principal for declaration of his title and possession of property is not barred by section 4 of the Act.[11]

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7 On law relating to benami, see *Controller of E.D.* v. *Aloke Mitra*, (1981) 2 SCC 121 (paras 4 and 5); *Kankarathanammal* v. *Loganatha*, A 1965 SC 271; *Jayadayal* v. *Bibi Hazra*, A 1974 SC 171; *Krishnanand* v. *M.P.*, A 1977 SC 796; *Gapadibai* v. *State of M.P.*, (1980) 2 SCC 327 (para 3); *Gulam Mohd.* v. *Mst. Mariyam*, 1984 Raj LW 321; *Raj Ballav Das* v. *Haripada*, A 1985 Cal 2; *P. Narayana Menon* v. *Bhageerathi* A 1985 Ker 14 (No presumption of advancement in favour of wife resulting trust under section 82, Trust Act, created); *Urmila Dasi* v.*Probodh*, (1985) 89 CWN 465.

8 *Rajagopal Reddy* v. *Padmini Chandrasekharan*, 1995 (2) SCC 630 (*Mithilesh Kumari* v. *Prem Bihari Khare*, A 1989 SC 1247 overruled); *Probodh Chandra Ghosh* v. *Urmila Dassi*, A 2000 SC 2534, 2000 (6) SCC 526.

9 *Nand Kishore* v. *Sushila*, A 1995 SC 2145.

10 *Haridhan Banerjee* v. *Bhadrawati Goswami*, (1995) 3 GLR 212.

11 *P.V. Sankara Kurup* v. *Lelavathy*, A 1994 SC 2694; *C. Gangacharan* v. *C. Narayanan*, A 2000 SC 589, 2000 (1) SCC 459.

VII. *Breach of Contract:* The exact manner in which the contract was broken must be stated in the words of the contract itself. If only one of the conditions is broken, the condition should be specified. Material facts about terms and conditions of contract must be alleged and proved.[12]

VIII. *Breach of Duty:* The facts on which the duty is founded, that is, if it is founded on a contract the particulars of that contract, and if it is founded on statute a reference to that statute should be stated, as also the facts, which bring the case within the statute. Where the statutory provision is a part of a long Act of Legislature it is not sufficient to give the name of Act. The particular section or clause thereof should be stated. The manner in which the breach took place or the facts constituting the breach should also be alleged.

IX. *Custom :* Full particulars of the custom must be stated showing its incidents and details, particularly when it is at variance with the general law.[13] It should also be alleged that the custom is reasonable, certain and immemorial and has been followed without interruption.[14] Where a defendant pleaded that adoption of orphan is valid under Hindu law but did not specifically plead a custom in modification, but as soon as plaintiff's first witness was examined, he was asked questions in cross examination about the custom, it was held that the parties knew what defendant's case was and his bad pleading should not prejudice the defendant.[15]

X. *Cruelty :* Particulars of the acts alleged to amount to cruelty should be given, with reference to date, time and place. In matrimonial cases specific allegations in detail should be pleaded to make out a case of cruelty. Cruelty should be such as to cause a reasonable apprehension in the mind of wife that it will be harmful or injurious for her to live with the husband.[16] Pleading of cruelty should contain substantial matters of complaint and give the time and place of their occurrence. It is not enough to plead trivial incidents that are just the ordinary wear and tear of married

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12 *M.P. Laghu Udhog Maryadit* v. *Gwalior Steel Sales*, A 1992 MP 215.

13 *Sital Prasad* v. *Ranjit Singh*, 1931 ALJ 390, A 1931 All 583.

14 *Parbhawati Devi* v. *Mahendra Narain Singh*, A 1981 Pat 133.

15 *Pannalal* v. *Chimman Prakash*, A 1947 Lah 547.

16 *Parvati* v. *Shiv Ram*, A 1989 HP 29; *Om Prakash* v. *Smt. Rajni*, A 1988 Delhi 107; *Kusum Lata* v. *Kampta Prasad*, A 1965 All 280; *Tushar Kana* v. *Bhowani Prasad*, (1969) 73 CWN 143.

life or to make general allegations of cruelty or nagging.[17]

XI. *Desertion :* In its essence, desertion meant the intentional, permanent, forsaking and abandonment of one's spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligation of marriage. [18] Desertion is a matter of inference to be drawn from the facts and circumstances of each case which have to be set out in detail.[19] To prove desertion, two essential conditions must be satisfied, viz., 1) the fact of separation *(factum deserendi)*; and 2) the intention to bring cohabitation permanently to an end, *(animus deserendi)*. The burden is heavily upon the party who alleges desertion.[20]

XII. *Easement :* It is not sufficient to allege the right of easement generally but the nature of the particular easement and how it arose should be specified, as also the manner in which the right is claimed to have been acquired, e.g., by grant (actual or lost), or prescription, or under a statute.[1] If it was an easement acquired by prescription, it must be specifically alleged that the right was exercised for at least 20 years ending within two years of the suit, without interruption and *as of right*. If the easement is claimed against government, user for 30 years should be proved. As against a transferee of the government, claimant can base his claim upon user for a total period of 30 years against government and the transferee, or can ignore the prescription against government and base the claim on 20 year's user against the transferee. Where, the plaintiff had alleged the circumstance of the user by himself and his ancestors of land as pathway for 40 or 50 years, the plaint was taken to cover the plea of long user leading to an inference of lost grant.[2] It is very important that the right was enjoyed *as of right*, and as an easement, because user as owner will not support a claim to easement.[3] In case of a private right of way the course and the

17 *Thomson* v. *Thomson*, (1957) I All ER 161.

18 *Lakshman Uttamchand Kripalani* v. *Meera*, A 1964 SC 40; *Sanath Kumar Agarwal* v. *Nandini Agarwal*, A 1990 SC 594.

19 *Bipin Chandra* v. *Prabhavati*, A 1957 SC 176.

20 *Lakshman Uttamchand Kripalani* v. *Meera*, A 1964 SC 40.

1 *Manmath* v. *Rakhal*, A 1933 Cal 215, 142 IC 458; *Numia Mal* v. *Maha Dev*, A 1962 Punj 299.

2 *Manmath* v. *Rakhal*, A 1933 Cal 215, 142 IC 458.

3 *Lalit Kishore* v. *Ram Prasad*, A 1943 All 362, not followed in *Mahesh Paratap* v. *Rampal*, A 1953 All 591.

termination of the alleged way should be shown with reasonable precision[4] and also whether the right claimed is for walking or for cattle or for carts and vehicles, or for funeral or marriage processions,[5] etc. In pleading a public right of way, however, *termini* need not be set out. In pleading an easement on the basis of lost grant, the essential fact to aver is user or enjoyment for a sufficient length of time which might give rise to the presumption of such grant.[6] In case of easement of light, the purpose for which the dominant heritage has been used should be stated. If an extinction of the right of easement is pleaded, the way in which it was extinguished should be particularised.

XIII. *Immorality:* In a suit by a Hindu son for setting aside an alienation by his father, it is not sufficient simply to state that the debt was contracted for immoral or illegal purposes, but full particulars of those purposes should be given, i.e., it should be stated clearly how the debt was connected with the immoral pursuits of the borrower.[7] It will not be sufficient merely to explain the nature of the illegality but it should be alleged when and to whom the money was paid, and in what way it was applied to the illegal purpose. For instance it is not sufficient to say that the debt was taken to pay off gambling losses. Particulars of the gambling or wagering transactions on which the losses were incurred should also be given.

XIV. *Justification:* Where a wrongful act is claimed to be justified, particulars should be given, e.g., that the act was done with permission or in self-defence or was due to pure accident, or was done under orders of third person (in which case the name of that person should be disclosed and it should be shown that he had authority to give such order).[8] Where in a suit for libel, truth is pleaded as a justification and the libel consists of one specific charge, no further particulars are needed, except the particulars of the specific charge itself, e.g., if the charge is that A had illicit intercourse with B, the time and place, when and where he had the

4 *Haris* v. *Jenkins*, (1882) 22 Ch D 481; *Rammanohar* v. *Methilla Prasad*, 57 IC 151 Pat.

5 *Ganga Sahai* v. *Khacheru Singh*, 1964 ALJ 617.

6 *Mahendranath* v. *Surajmal*, 45 CWN 17.

7 *Tulshiram* v. *Bishnath*, 105 IC 885, 25 ALJ 753; *Jagdish Narain* v. *Hazarilal*, 140 IC 535, 32 ALJ 309; *Bal Rajaram* v. *Maneklal*, 1947 ALJ 752; *Shaukat Ali* v. *State*, 1956 ALJ 460.

8 *Thorne* v. *Tilbury*, (1858) 3 H&N 534; *Henderson* v. *Williams*, 1 QB 521.

intercourse must be stated. But where the charge is a general one, e.g., that the plaintiff is swindler, the defendant must give specific instances of conduct justifying such a description, with sufficient particularity to give notice to the plaintiff what the defendant means to prove to substantiate the truth of the alleged charge.[9] Where the defence was that the words complained of were fair comment upon facts which were matters of public interest, and that they were published on a privileged occasion, the defendant was ordered to give particulars of facts said to be matters of public interest, and of the circumstance of the occasion alleged to be privileged.[10]

XV. *Legal necessity :* Where a Hindu father's transfer is sought to be justified by legal necessity full particulars of the actual necessity with such further facts as go to make that necessity a legal necessity, should be stated.

XVI. *Representation:* Particulars should be given whether the representation was oral or in writing and when and where it was made. If in writing, the writing should be specified.

XVII. *Special Damages :* It is not sufficient to allege the amount of damages suffered, but full details of the damages sustained should be given. For instance it is not sufficient to claim Rs. 500 as "cost of defence" in a suit for malicious prosecution, but details of the expenses incurred in defence should be given. In case of breach of contract when plaintiff has suffered damages greater than those which ordinarily and usually arise from such breach, he must, if he wishes to recover the extraordinary damages, prove that at the time of making of the contract, he communicated the special circumstances to the other party and the latter entered into the contract with the knowledge of the special loss which would accrue to the plaintiff on a breach of that contract. Unless such notice is given, the damages are spoken of as too remote in law. An illustration of special damage of this character is the case of man wanting repair to machinery in sugar mill. It may be that, if the repairer exceeds the stipulated time, the owner of the mill might suffer a great loss by losing part of whole of the season's profits, but unless he has told the repairer exactly what the circumstances are and

9 *Gordon Summing* v. *Green*; 7 TLR 408.

10 *Subhas* v. *R. Knight*, 101 IC 565, 54 C 73, A 19927 Cal 297.

11 *See* notes under precedent (of plaints) No. 161 Part II.

the special loss which would accrue to him, he cannot recover that special loss. The fact that this notice was given and that the contractor undertook the work on the condition of being liable for special damages must, of course, be specifically pleaded.[11] In motor accident cases general damages are presumed by the court, but special damages are to be specified.[12]

XVIII. *Title to Property:* In cases when a party alleges himself to be the owner of land, he need not give any particulars of his title if he is in possession, but may simply allege his title, unless he admits the legal title of the other party and relies only on some equitable title in himself. For instance, a defendant in possession need not plead his own title but may plead that he is a *bona fide* transferee for value from an ostensible owner and may give particulars of that plea only. When a party is not in possession, he must give full particulars of the title he pleads, e.g., if he pleads title as heir, he must allege how he is the heir, if he pleads title by assignment he must show by what steps the estate became assigned to him. If a title, short of absolute proprietorship, is pleaded, e.g., as mortgagee, lessee, etc., full particulars of the mortgage, lease, etc., should be given, e.g., who granted the mortgage or lease, when, and for how long. The nature of the deeds and documents on which a party relies in deducing his title from the person under whom he claims, should be fully given. If title by adverse possession is pleaded, it should be clearly so alleged.[13] It has, however, been held in the undernoted case that if in the course of pleadings the plaintiff clearly claimed title by adverse possession in the alternative, the fact that he did not allege this specifically in plaint is immaterial.[14]

If both the parties are admittedly in joint possession, e.g., in a suit for partition of property, or for declaration of shares in a joint occupancy holding belonging to both the parties, particulars of the title to the share claimed should be given.[15]

In cases however, where the opposite party is estopped from

12 *Puspabai Parshottam Udeshi* v. *Ranjeet Ginning & Pressing Co Ltd.* A 1977 SC 1735, (1977) 2 SCC 745.

13 *Shiromani Gurdwara* v. *Premdas*, 140 IC 694; *Karimullah Khan* v. *Bhampratap Singh*, A 1949 Nag 65.

14 *Municipal Board, Lucknow* v. *Mt. Kallo*, A 1949 Oudh 32.

15 *Moti Lal* v. *Judister*, 31 IC 181, 20 CWN 310.

denying a title, e.g., by Sec.116 of the Evidence Act, such title need not be pleaded. In a case for rent against a lessee, the lessor need not show his title. It is sufficient for him to plead that he let the property to the defendant at a certain rent, and that the defendant entered into possession under the lease. But if the suit is brought by the lessor's heirs, the title of the lessor must be alleged to show that it was capable of passing by inheritance to the plaintiff. The lessor may himself have been a tenant for life and the defendant would not be estopped from saying that his lessor's title has been determined by death.

XIX. *Title of another person* : Similar particulars should be given when title is alleged in a third person, e.g., when a licensee of a third person claims right of possession as licensee, the title of his licensor should be pleaded with particularity. The reason is that a party, may be presumed to be ignorant of his adversary's title. But when title is pleaded in the opposite party with the object of making him liable, it is not necessary to allege title more precisely than is necessary to show his liability. For instance, in a suit for rent against the assignee of the lessee after several mesne assignments, it is sufficient to plead only that "all the rights and liabilities of the lessee have, by assignment, come to be vested in the defendant." So, in a suit for debt against the heir of the original debtor, particulars of the heirship of the defendant need not be pleaded with the same precision as would be necessary if the plaintiff claimed as heir of the original creditor.

(What particulars are required in other kinds of suits will be indicated in the footnotes to the precedents of such suit in Part II of this book, post)

Mistakes in Particulars : If the particulars are wrong, they can be corrected by an application for permission to amend them, and if they are not corrected and the mistake is likely to mislead the other party, the party giving the particulars must suffer the consequence. But if the error or mistake does not mislead the defendant and the particulars given are sufficient to make the defendant understand what the plaintiff means, the error is of no consequence. For instance, in a suit on a pronote, the date and parties of which are correctly described but the amount of loan and the rate of interest are wrongly given but there were circumstances showing that the defendant had no difficulty in identifying the pronote, the

defect was held not to be fatal.[16]

Form of Particulars : Particulars should always be given in the pleadings themselves.[17] When they are very short and can conveniently be stated alongwith the fact to which they relate, they should be so stated, but they should not be mixed up with the allegations of facts. Where they are long, they may be given in a separate paragraph following that in which the main fact is stated.

When, however, the particulars to be given are very long, e.g., account in a suit for money, or long specification of the property claimed in suit, it is more convenient to separate them from the text and to enter them at the foot of the pleading, shortly referring to them in the body of the pleading in some such way as :

"The defendant has borrowed money from the plaintiff from time to time, and has also made some payments on account, full particulars of which are given at the foot of the plaint," *or*

"As per account given at the foot of the plaint, the defendant owes the plaintiff the sum of Rs. 500 as balance", *or*

"The plaintiff's father was owner of several items of land and house property details of which are given in schedules A, B and C at the foot of the plaint."

When the particulars are too voluminous to be included in the plaint they may be annexed thereto or delivered separately and the fact stated in the plaint.[18]

When particulars are ordered under O.6, R.5 they may be delivered in the following form:

Particulars delivered in pursuance of the order of court dated——, passed on the application of the defendant :

1. The following are the particulars of the fraud alleged by the plaintiff in para 4 of his plaint :

(State the particulars in paragraphs)

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16 *Nama Giri* v. *Muthu*, 111 IC 887, A 1928 Mad 940 (DB).

17 O.6, R.4.

18 *Ram Prasad* v. *Hazarimall*, 58 C 418, 134 IC 538, A 1931 Cal 458.

2. The following are particulars of the damages claimed by the plaintiff:

(State the particulars in paragraphs)

3. The following are the particulars of (*here state the matters in respect of which particulars have been ordered*) delivered pursuant to the order of the ————————of————————.

(Here set out the particulars ordered in paragraphs if necessary.)

If particulars are delivered in pursuance of an order of the court they need not be stated in the form of an application, so that no court-fee stamp will be required.

If any particular form is prescribed by any High Court, particulars should be delivered in that form. The Madras High Court in the original side has prescribed that the particulars should be drawn up in the form prescribed for the written statement of a defendant and shall be endorsed with a reference to the order directing the same.

Pleading to Particulars : Particulars are part of the pleading when contained in it and must be deemed to be so even if separately delivered. The opposite party should, therefore, plead to particulars and where particulars are delivered after the pleading of the opposite party, the latter should ask for leave to file additional pleading in answer to the particulars.

(As to when particulars should be ordered and when refused see Chapter VIII post.)

(For rules regarding giving and ordering further particulars; and consequence of not delivering them, see Chapter IX, post.)

Chapter VII

ALTERNATIVE AND INCONSISTENT PLEADINGS

Alternative Pleas : There is nothing in law to prevent a plaintiff from relying upon several different rights in the alternative, or to prevent a defendant from raising as many distinct and separate defences as he likes. Such pleas or rights may even be inconsistent.[1] A party to a suit may set up such sets of facts as may give rise to different rights in law. O.7, R.8 specifically permits a plaintiff to seek relief in respect of several distinct claims or causes of action founded upon separate and distinct grounds. He may rely upon one set of facts for his success, failing which he may fall back upon the other set of facts. Neither O.6, R.2 nor any other provision of the Code prohibits a party from taking alternative or inconsistent pleas. A party should not be precluded from taking such pleas, provided all the facts, should clearly and distinctly be stated and no injustice or prejudice would be caused to the other party. Thus where in a suit for specific performance of a contract to sell a house the plaintiff pleaded that in part performance thereof he had paid the defendant a certain sum of money and had been put in possession of the house, and the defendant in his written statement denied the contract but set up the case that he had taken that sum of money as a loan and it was only for facilitating payment of interest due on the loan that the plaintiff had been put in possession, the court disbelieved the plaintiff's case but decreed the suit on the basis of the defendant's own plea. The defendant in such a case can neither contend that he had been taken by surprise nor that he was not given an opportunity to adduce evidence.[2] Again where in a suit to enforce a mortgage security the defendant's plea that the mortgage was void was upheld by courts, the Privy Council held that it was open to the plaintiff to repudiate the transaction altogether and claim a relief outside it in the form of restitution under section 65, Contract Act. Although no such alternative claim was made in the plaint or in the courts below, the Privy Council allowed it to be advanced

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1 *Bhutan Mohini Dasi* v. *Kumud Bala Dasi*, A 1924 Cal 467, 82 IC 954 (DB); *Indubai* v. *Jawahar Lal*, A 1990 MP 80.

2 *Firm Sriniwas Ram Kumar* v. *Mahabir Pd.*, A 1951 SC 177.

and gave a decree on the ground that the defendant-respondent could not be prejudiced by such a claim at all and the matter ought not to be left to a separate suit.[3]

In case of an apprehension of prejudice being caused to the other party or of fair trial being embarrassed by inconsistent pleadings the court may take recourse to O.6, R.16 and pass orders for amending the pleading or for striking out any portion of it.[4] Where the suit on the new or inconsistent case or cause of action would be barred by limitation at the time it is sought to be put forward the court will thus not allow any amendment in the pleadings for setting up that case.[5] But if the amendment amounts merely to different or additional approach to the same facts, then amendment should be allowed even after expiry of limitation.[6] The party may also be put to election in case of likelihood of prejudice to the other party.

It has thus been held that as a matter of law a party may claim ownership and easement rights in the alternative.[7] But in such cases the difficulty of proof may arise, for a person claiming a prescriptive right of easement has to establish that he had exercised the use as an easement, i.e., he had the requisite animus, for the requisite period.[8] Alternative pleas of joint ownership of *rasta* land and of easement of right of way have also been held to be permissible.[9] It has been held that an easement of necessity and an easement by prescription can alternatively be pleaded.[10] Such a plea must, however, be clearly made and proved. Mere suggestion

3 *Mohan Manucha* v. *Manzoor Ahmad*, A 1943 PC 29, 70 IA 1; followed by Supreme Court in *Firm Sriniwas Ram Kumar*, supra.

4 *M Mohammad* v. *A Narayana Rao*, 1973 KLT 511.

5 *Bhagwanji Morarji Goculdas* v. *Alembic Chemical Works*, A 1948 PC 100.

6 *A.K. Gupta & Sons* v. *Damodar Valley Corporation*, A 1967 SC 96.

7 *C.Mohammed* v. *Ananthachari*, A 1988 Ker 298; *Sayrabai* v. *Ahmedji*, A 1960 MP 111; *Laxminarayan* v. *Fajjulal*, A 1933 Nag 257; *Vyas Gopichand* v. *Mattoo Lal*, A 1971 Raj 237; *Purani Dhiraj Lal* v. *Sankleshwar*, A 1976 Guj 180.

8 *Lalit Kishore* v. *Ram Prasad*, A 1943 All 363; *Raychand* v. *Manaklal*, A 1946 Bom 266 (FB); *Subha* v. *Akkamal*, A 1942 Mad 392; *Chapsibhai* v. *Purushottam*, A 1971 SC 1878; *Ram Dev* v. *Ram Badan*, A 1984 All 206; *Imam Din* v. *Nizam*, A 1943 Lah 267.

9 *Atiqa* v. *Aquila*, A 1956 All 415.

10 *Sengoda Gounder* v. *Sengoda Gounder*, 1999 (1) LW 422 Mad.

in the relief clause that there was uninterrupted possession for over twelve years and that the plaintiff had acquired an adverse title was held not to be enough as long possession was not necessarily adverse possession and the prayer clause was not a substitute for a plea. It was required to be averred as a fact as to why hostile possession was asserted, *i.e.*, when the possession became adverse.[11] Where the Government claimed title as well as prescription of title by adverse possession the property was recorded as Government property in records, and the Government had been exercising right over the statutory period, the pleas of title and adverse possession were held not inconsistent pleas.[12]

A pre-emptor may claim partial pre-emption alleging vendor's want of title to the portion not claimed, and in the alternative, pre-emption for the whole if the court found vendor's title to the whole.[13] Similarly, in a suit for pre-emption there is nothing to prevent a defendant from setting up a plea of estoppel in addition to a plea denying the custom of pre-emption.[14] A suit for declaration of proprietary title or in the alternative for pre-emption is maintainable.[15]

Similarly, a defendant may plead in suit on a bond that he did not execute it, and in the alternative that the claim is barred by limitation. But facts on which each alternative claim (*see* O.7, R. 8) or defence is based must, as be distinctly and separately stated.[16] If they are not clearly set out, the court will not permit an attempt to show that any particular ground can be covered by implication from certain allegations. Thus, in a suit by son to set aside certain transfers made by his mother the plaintiff simply alleged that his mother at the time of making the transfers, was of unsound mind, and added that the donee was residing with the said mother who was entirely under her dominion and control and the donee was well aware of the mental condition of the donor. The Privy Council held that on these allegations the plaintiff can be said to base his claim only on unsoundness

11 *S.M.Karim* v. *Bibi Sakina*, A 1964 SC 1254.

12 *Karnataka Waqf Board* v. *State of Karnataka*, A 1996 Kant 55 (DB).

13 *Afzal Husain* v. *Huran Bibi*, 27 ALJ 589, 116 IC 16, A 1929 All 398 (DB); *Rambhau* v. *Ganesh Deorao*, A 1948 Nag 32.

14 *Sankaranayana Iyer* v. *The Kotayam Bank Ltd.*, A 1950 Tr. Co. 66.

15 *Bhagwati Saran* v. *Parmeshar Das*, 12 ALJ 798, 25 IC 283, 36 A 476.

16 *Official Assignee* v. *Badiya*, 30 CLJ 428, 145 IC 181.

of mind of the donor and claim on the ground of undue influence cannot be entertained, because if he wanted to make an alternative case of undue influence he ought to have pleaded that separately. The statement that the donor was under the dominion and control of the donee was considered to have been made only incidentally in connection with the allegation of mental incapacity.[17] Where the plaintiff alleged in the plaint merely that forward transaction was settled because of great fluctuation in market and consequent decision of Vyapar Mandal to that effect, he was not allowed to contend that since the defendant had failed to pay margin money demanded from him, the transaction had been settled.[18]

Inconsistent Pleas : The litigant, availing himself of the right to press inconsistent cases before the court and trying to establish both by contradictory oral testimony, however, plainly places himself in peril and may find himself entangled in inextricable difficulty, for evidence in support of two absolutely inconsistent cases, can hardly be expected to secure confidence. A plaintiff may set up two inconsistent cases, though the circumstance might militate strongly against his succeeding in the case.[19]

A defendant cannot take plea that he has interest in the property as a member of the Joint Hindu Family and at the same time take the plea of adverse possession.[1] The pleas of tenancy and adverse possession or licensee are inconsistent pleas and are not permissible.[2] The plea of benami and the plea of a long possession may be inconsistent, but a defendant can resist the suit and take the said inconsistent pleas.[3] In a partition suit it is open to the defendant to take the plea of adverse possession, though in the earlier execution proceedings, he pleaded possession by way of partition.[4] In a petition under Sec. 9 of the Hindu Marriage Act for restitution of conjugal rights, in alternative relief of divorce may be prayed.[5] Where certain fact is admitted, the question of law automatically follows. Where

17 *Ismail* v. *Hafiz Boo*, 33 C 773, 33 IA 86.
18 *Ganesh Lal* v. *Joti Prasad*, 1969 ALJ 1104.
19 *Sheonarain* v. *Bhullar*, A 1950 All 352.
1 *Arjan Dev* v. *Om Prakash*, A 1992 Delhi 202 (DB).
2 *Conrad Dias* v. *Joseph Dias*, 1995 (3) Bom CR 218 (Bom).
3 *Chatur Bhuj Prasad Khattri* v. *Hari Narain Khattri*, A 1991 All 72.
4 *Thimaiah* v. *Madegowda*, A 1989 Kant 83.
5 *Krishna Devi* v. *Add l. Civil Judge, Bijnore*, A 1985 All 131.

the plaintiff admits the defendant as monthly tenant in the suit premises, the defendant's plea, though not taken in the written statement that the lease in question was against the public policy, cannot be said to be not consistent with the pleadings of the parties.[6]

General Principle: The following may be taken to be the general rule:

There can be no objection to preferring alternative and inconsistent claims or raising inconsistent pleas, provided they are based on facts which are not inconsistent.[7] Even pleading of inconsistent fact is not prohibited as a matter of law, but alternative claims or pleas which are based on facts which are so inconsistent that the evidence required to prove one fact is destructive of the plea of the other fact, should be discouraged,[8] except when the facts are not within the personal knowledge of the party pleading them. If the alternative pleas are such as may tend to prejudice, embarrass or delay the fair trial of the suit, the court may order any matter in the pleading to be struck out or amended under O. 6,R. 16 (b).

A few illustrations will elucidate this: A decree-holder can attack a transfer as sham and in the alternative as fraudulent.[9] A mortgagor may allege that the mortgage money has been paid and may, in the alternative, offer to pay the portion that may still be found to be due.[10] A plaintiff in an ejectment suit may claim a decree on the ground that the defendant is his tenant or that he is a trespasser.[11] Similarly, a defendant in an ejectment suit may claim right as tenant or title by adverse possession.[12] In a suit for possession under a deed of *waqf* the defendant pleaded that she did not execute the deed, and that the plaintiffs who were related to her

6 *Hindustan Commercial Co.* v. *Baidyanath Bhattacharjee*, A 1991 Cal 88 (DB).

7 *S. Narayan* v. *K. Bank*, A 1950 Tr. Co. 66 (FB); *V.V. Kamble* v. *Mascarenhas*, A 1967 Goa 97.

8 *Motilal* v. *Judhistir*, 20 CWN 310, 22 CLJ 254, 311 IC 181.

9 *Ouseph Skaria* v. *Cheman Joseph*, A 1965 Ker 288; *Bhola Ram* v. *Peari Devi*, A 1962 Pat 168 (undue influence).

10 *Butchanna* v. *Vernahalu*, 24 M 408.

11 *Lakshmibai* v. *Hari*, 9 Bom HCR 1; (*see* Chap. VIII for cases where suit is based only on relationship of landlord and tenant and on failure to prove the same, relief may be granted on the basis of title.)

12 *Chhaikuddin* v. *Ram Narayan*, A 1926 Cal 364, 90 IC 670 (2) DB; *Atma Ram* v. *Paras Ram*, A 1971 HP 11; *Ram Rachhya* v. *Kamkhya Narain*, A 1925 Pat 216.

deceived and falsely told her that in order to facilitate the management of her property, she should get a deed completed, suggesting thereby that the deed was obtained from her, without her being actually told what it was, by fraud and undue influence. The alternative pleas of denial of execution and fraud were allowed as there was no inconsistency in the facts on which they were founded.[13] Similarly, a defendant may deny her marriage with the plaintiff and may, in the alternative, plead that if the ceremony which she went through with him amounted to marriage it was null and void, as her consent was not taken. In a suit by an adopted son, the defendant who claimed under a deed of gift from the widow of the adoptive father was allowed to deny the adoption, and at the same time to plead that, even if the adoption was made, it was conditional on the provision of the will in favour of the widow being acquiesced in by the plaintiff's natural father.[14] Such inconsistent pleas were permitted because the defendant was no party to the will or the alleged adoption.

When a plaintiff sued as reversioner of his maternal grandfather A and the defendant claimed under a sale deed from a daughter of A, the defendant was allowed to plead that the sale by the daughter was justified by legal necessity and, in the alternative, that A had left a son on whose death, the property passed to A's widow, as mother, and on her death, the plaintiff became entitled to the property and he lost that right by adverse possession of A's daughter.[15] The reason is that though the two pleas, one involving an admission of the title of A's daughter and the other involving a denial of it are inconsistent, yet the inconsistency causes no embarrassment and the evidence of the two pleas is by no means conflicting. A plaintiff sued for enhancement of rent on the allegation that the rent was produce rent, but, as it was wrongly entered in survey records as cash he accepted the entry and wanted enhancement. It was held that there was no inconsistency in the claim.[16] Likewise, a suit for a declaration that the plaintiff is owner under a valid title, or, in the alternative, on the ground of adverse possession would be maintainable.[17] For, though ownership and

13 *Farid-un-nisa* v. *Mukhtar*, 46 IC 488.

14 *Narayan Swami* v. *Ramaswami*, 14 M 172; *cf.* A 1928 All 582 (A stranger to a transaction may be allowed to take inconsistent pleas about it).

15 *Sri Rang* v. *Rancheyya*, 13 IC 128, 13 CLJ 439.

16 *Parmeshwar* v. *Ramanandan*, 42 IC 620, 2 Pat LJ 226.

17 *Luvar Popat Kala* v. *Bachu*, A 1958 Bom 152.

adverse possession are inconsistent things, yet there is no conflict in the evidence which would be required to prove either; even for adverse possession one has to assert possession under claim of ownership. A gift may be attacked as non-existent and in the alternative as having been made to defraud creditors.[18] The following cases where inconsistent pleas were allowed may also be seen.[19]

A plea of payment should not ordinarily be permitted to be joined to plea that the bond is a forgery and that the defendant never borrowed the money. Nor is it proper to permit defendant to deny a contract and allege it was intended to be wager. But where he is merely a representative of the original party he may be allowed to raise both these defences, if he has no personal knowledge of the transaction. For example, when the sons were sued for money misappropriated by their deceased father, they were allowed to plead alternatively that there was no misappropriation and that the father having acted dishonestly and his acts amounting to a criminal offence, the sons are not liable under the Hindu Law.[1] But the Allahabad High Court held, on the authority of English precedents, that the pleas that defendant did not execute the bond and that he has paid it up can be taken together, and that such pleas are generally taken as a matter of tactics when it is intended to force the plaintiff into the witness-box to prove the deed and thus to get an opportunity to cross-examine him with regard to the other plea.[2] Similarly it is permissible in a suit for libel to plead that the words complained of were not published of, and concerning, the plaintiff and that they constituted fair and *bona fide* comment.[3]

The plaintiff was not permitted to take the inconsistent pleas that there was joint family nucleus from which the property in question was

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18 *State of Punjab* v. *Giani Birsingh*, A 1968 Punj 479.

19 *T.S. Mohd.* v. *A Fathummal*, A 1973 Mad 302 (Gift or release); *Janaganti China Venkata Rajaum* v. *Kappojee*, (1912) 15 IC 382 (Mad DB) (free-hold or service tenure); *S.S.Hameed & Co.* v. *Universal Fire Insurance Co.*, A 1924 Rang 317, 83 IC 593 (contract of insurance not in existence at time of fire or if it did, condition precedent not satisfied).

1 *Toshanpal* v. *The District Judge of Agra*, 51 A 386.

2 *Muhammad Zafar* v. *Zahur Hasan*, 49 A 78.

3 *Union Benefit Guarantee Co.* v.*Thakor Lal*, 161 IC 769, A 1936 Bom 144.

acquired and that the property in question was self-acquired property and was blended with the joint family property and as such became joint family property.[4] Again, a plaintiff assailing an agreement as void on the ground of fraud was not permitted, in the same suit, to pray in the alternative for specific performance of the same contract,[5] though, as provided in section 37, Specific Relief Act 1877 (corresponding to section 29 of the 1963 Act), a plaintiff suing for specific performance of the contract can alternatively ask for rescission of the contract.[6]

There is thus no difficulty about taking alternative pleas which are based on mutually consistent allegations of facts, or about claiming alternative reliefs on the basis of the same allegations; the only difficulty is about inconsistent pleas on the basis of inconsistent factual allegations. Even when in theory inconsistent factual pleadings are allowed, a pleader would be ill-advised to raise them, for a judge is likely to come to the conclusion that a party who had to rely on inconsistent statements has a case of very little merit. It is thus a great risk for any pleader to take, for, if the pleas are contradictory, they work out their own retribution by disproving each other to the extent of that contradiction. The Bombay High Court in respect of a writ petition observed that objections to the petition on the ground of delay and that it is premature are mutually destructive.[7] A pleader should rather decide on one line of defence without introducing matters which will certainly give rise to suspicion. Where, however, a party is, from obscurity or from complexity of facts, in honest doubt as to the relief available to him, inconsistent claims may be entertained.[8] Inconsistency may be ground for viewing both allegations with suspicion but does not render the suit unsustainable.[9] It is certainly open to a party to raise inconsistent defences in the alternative but at the same time when evidence is led he has got to elect as to which of the two alternative or inconsistent defences he is going to prove.[10] The plea of

4 *Balbhadra Nishanka* v. *Suka Dibya*, (1972) 38 CLT 325, 1972 (1) CWR 513.
5 *Kamlabai* v. *Moti Ram*, 1983 MPLJ 343.
6 *Prem Raj* v. *DLF Housing Ltd.*, A 1968 SC 1388.
7 *Damomal* v. *Union of India*, A 1967 Bom 335.
8 *Mt. Daiwati* v. *Mt. Tunki*, 164 IC 804, A 1936 Pat 474.
9 *Sheo Narain* v. *Bhaller*, A 1950 All 352.
10 *Raychand* v. *Maneklal*, A 1946 Bom 266 (FB).

adverse possession and alternative plea for retention of possession by operation of section 53A, of the Transfer of Property Act, being inconsistent, pleas are not available.[11] Where the plaintiff alleges that the deed executed by her is a forgery, the Court should not allow pleading an inconsistent issue whether it was executed under undue influence. The plaintiff cannot be permitted to allege two absolutely inconsistent state of facts each of which is destructive of the other. [12] The defendant contesting the will propounded by the plaintiff on the ground of forgery cannot be allowed to set up an alternative claim of undue influence.[13]

An alternative plea by the plaintiff which not only changes the entire nature of the suit but may also take the case out of the jurisdiction of the court which the court is called upon to exercise in that particular proceeding cannot be permitted; thus a plaintiff who has filed a suit in the ordinary civil court on the ground that the defendant is a trespasser cannot be permitted in the same proceeding to claim possession on any ground available, under the provisions of the Rent Act. [14]

11 *Mohanlal* v. *Mirz. A. G.*, (1996) 1 SCC 639.
12 *Abdul Rahim* v. *Md. Azimuddin*, A 1965 Pat 156.
13 *Gobinath* v. *Chumi Lal*, A 1953 Nag 316.
14 *Govind Ghai* v. *New Shorrock Mills*, A 1984 Guj 182.

Chapter VIII

VARIANCE BETWEEN PLEADING AND PROOF

Variance between Pleading & Proof : As a general rule, a plaintiff is bound by his pleading and should not be allowed to contradict the facts stated therein, or to succeed on a case not made out in his plaint.[1] The ordinary rule of law is that evidence should be given only on plea properly raised and not in contradiction of the plea.[2] The pleadings of the parties form the foundation of their case and it is not open to them to give up the case set out in the pleadings and propound a new and different case.[3] A party cannot be allowed to adduce evidence for setting up a case inconsistent with the one alleged in its pleadings.[4] For instance, a defendant, basing his case as adopted son of plaintiff's deceased husband, cannot prove his title as adopted son of the plaintiff.[5] Although a party can raise several alternative and inconsistent pleas[6] it does not follow that if he has raised only one plea, he can be permitted to raise another at a later stage of the case. He must be held to the claim or defence set up by him in his pleading and cannot be allowed to build a case inconsistent with that in his pleading,[7] or with his oral statements under O. 10 (which too have the character of pleadings)[8], although he could, if he chose, have alleged that other ground of claim or defence in his original pleading.

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1 *Om Prabha Jain* v. *Abnash Chand*, A 1968 SC 1083, (1968) 3 SCR 111; *Prakash* v. *Smt. Bhagwani*, (1995-2) Punj LR 491 (P&H); *Shankar Mandal* v. *Deputy Collector, Land Reforms*, A 1992 Pat 38(FB); *Mahipalpur Co-operative Society Ltd.* v. *Prabhati*, A 1986 Delhi 94.

2 *Om Prabha*, supra

3 *Vinod Kumar* v. *Surjit Kaur*, A 1987 SC 2179.

4 *State of W.B.* v. *Mir. Fakir Mohammad*, A 1977 Cal 29.

5 *Deoki Nandan* v. *Murlidhar*, A 1957 SC 133.

6 See Chap VII, ante.

7 *Hemendra Nath Roy* v. *Upendra Narain Roy*, 22 CLJ 419, A 1916 Cal 829 (FB); *Annandacharan* v. *Hargovind*, 27 CWN 2496, 37 CLJ 552, A 1922 Cal 570; *Gopal* v. *Abdul*, 65 IC 640, 34 CLJ 319; *S.M. Gopala* v. *Secretary of State*, 101 IC 346 Mad; *Ratan Singh* v. *Nanikram*, A 1927 Sindh 219, 109 IC 183; *Gondli* v. *Joynai*, 26 CWN 294; *Esher Chander* v. *Sharma Churn*, 11 MIA 7; *Maganlal* v. *Krishan Bibi*, A 1935 All 303, 153 IC 1068; *State of W.B., supra*; *Abdul Khalique* v. *Bepin Behari*, A 1936 Cal 465.

8 *Md. Yahya* v. *Rahem Ali*, A 1929 Lah 165, 117 IC 712.

In the undernoted case[9] the defendant lady in her written statement had denied the genuineness of the pronote, which was put in issue, but while giving evidence at the trial she admitted her signature and proceeded to set up an entirely new case by explaining how her signature was obtained. The Chief Court of Oudh strongly deprecated this. In another case,[10] the Privy Council characterised as irregular the procedure of the trial court in allowing evidence to be adduced on points not raised in the pleadings or issues and held that this should not have been allowed without amendment of pleadings and issues. But in seeing whether there has been a variance between pleading and the case set up at the trial, a court should not look merely at the wording of the plaint but also the issues and the manner in which the case was fought out.[11] A mere incidental mention of particulars about ornaments in a schedule annexed to the plaint was not, however, considered as conclusive or irrebutable against the plaintiff.[12] A plea of protection under section 76(a) of the Transfer of Property Act not raised in the pleadings cannot be allowed to be raised at the time of arguments.[13] Where the defendant in written statement has not pleaded that the sale deed has been executed for discharge of antecedent debt, the evidence led on that score by him is without jurisdiction and the court has no jurisdiction to come to a finding on that score on the basis of the said evidence.[14] In the absence of any pleading, or any issue, that sub-letting was made with the permission of the landlord, the court has no jurisdiction in holding that it was done with the landlord's permission.[15]

Whether a plaintiff can be allowed to abandon his case and adopt that of the defendant and claim relief on that footing depends on the circumstances of the case.[16] A plaintiff who fails to prove all the facts

9 *Rudra Pratap Narain Singh* v. *Gajraj Koer*, A 1935 Oudh 165, 152 IC 977.

10 *Hemchand* v. *Peareylal*, A 1942 PC 64.

11 *Sagar Mal* v. *John Carspiet*, 124 IC 187; *Bejoy Kumar* v. *Satish Chandra*, A 1936 Cal 382; *Mohammad* v. *Secretary of State*, A 1939 Lah 330.

12 *Waziran* v. *Rashidan*, A 1937 All 783, 172 IC 61.

13 *K.C. Bhaskaran Nair* v. *Carona Shoe Co. Ltd.*, A 1987 Ker 132.

14 *Biramchi Narayan Hadu* v. *Krishnapriya Debi*, A 1991 Orissa 55; *Siddique* v. *Saran*, A 1930 PC 57.

15 *Gapulal* v. *Dwarkadheeshji*, A 1969 SC 1291.

16 *Firm Sriniwas Ramkumar* v. *Mahabir Prasad*, A 1951 SC 177 (permitted); *Mohan Manucha* v. *Manzoor Ahmad*, A 1943 PC 29 (permitted); *Nagendra* v.

alleged by him may yet obtain the whole or part of the relief if the facts pleaded by the defendant and found by the court show him to be entitled thereto. Thus where the plaintiff sued as assignee of mortgagee and the defendant pleaded that the assignment was sham and bogus, the court found that the assignment was made *benami* and plaintiff was a *benamidar*. The suit was decreed on the ground that a benamidar can always sue in his own name.[17] In another case, plaintiff in a suit on a bond pleaded cash consideration and the defendant, while admitting execution, denied the receipt of cash and it was found that there was no cash consideration, the court held that relief could be given on the basis of admission of execution by the defendant.[18] Where the plaintiff and the defendant had jointly executed a bond in favour of third party, and the plaintiff alone was compelled to pay the whole amount, he brought a suit for ecovery of the whole amount from the defendant contending that the latter was the principal debtor and the plaintiff was a mere surety. Though this case was not established the plaintiff was allowed to recover a proportionate amount as co-debtor, as it was held that this alternative claim for contribution was impliedly covered by the pleadings.[19]

The plaintiff sued for recovery of Rs. 500/- said to have been advanced on receipt, but it was proved that there was no cash advance and defendant had promised to pay the plaintiff Rs. 500/- if the plaintiff

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Pyari, 20 CWN 319, 21 CLJ 605 (not permitted); *Faizul Kamdar* v. *Hafiz Nazi*, 141 IC 769 (permitted); *Devanna* v. *Madappa*, 14 Mys. LJ 305 (permitted); *Lakshmi Kuttis* v. *Narain Pillai*, A 1968 Ker 57 (permitted); *Permanandas* v. *Shankar Path*, A 1951 Ori 11 (permitted); *Khali Panigrabi* v. *Kamla Devi*, A 1967 Ori 100 (permitted); *Kandaswamy Udayear* v. *T.S. Karuppudaya*, (1969) 2 MLJ 222 (partial acceptance of defendant's version, not permitted); *Sudarshan Trading Co.* v. *D'Souza*, A 1984 Karn 214 (Defendant's plea of lease different from the lease pleaded by plaintiff accepted, and relief granted: following *Kamalakasha Rai* v. *Keshava Bhatta*, A1972 Ker 110, per *Krishna Iyer J.*; *Shikhar Chand* v. *Mst Bari Bai*, A 1974 MP 75 (permitted); *Ranvijaya* v. *Bala Pd.*, A 1978 Pat 91(permitted); *Syed Jaleel* v. *Venkata*, A 1981 AP 328 (permitted); *Ram Dayal* v. *Jummun Toy*, 14 Cal 791 (FB) (not permitted); *Govindsami* v. *Kandasamy*, 1956 (2) MLJ 578 (not permitted); *Lodd Bala Mukund Das* v. *Kothandapani*, A 1971 Mad 422 (not permitted).

17 *Narayan Rao* v. *Hanumant Rao*, 65 IC 503, A 1923 Nag 273.

18 *Bhikulal* v. *Ganpat Sita Ram*, 1941 NLJ 530, A 1942 Nag 12.

19 *Jayawickreme* v. *Amarasuriya*, A 1918 PC 287.

did not bid at an auction sale and the plaintiff kept to his agreement, the Nagpur High Court held that as the agreement was lawful, plaintiff should get a decree.[1] A plaintiff's case as laid in the amended plaint was that the Raja of Ajaigarh had constructed the well and dedicated it to the public and that they and the *mohalla* people had been drawing water from the well since time immemorial. The plaintiffs failed to prove that well was constructed by Raja and was dedicated by him. They tried to fall back on customary right to draw water. The High Court did not accept the contention that the plaintiffs should be denied relief on technical construction of plaint.[2] In a case where plaintiff failed to establish the mortgage of occupancy holding set up by him relief was granted on the basis of a different mortgage set up by the defendant.[3] In another case, when one party pleaded separation and the other jointness, the court held that there was reunion after separation.[4] When the parties went to trial knowing full well what they were required to prove and adduce evidence of their choice in support of the respective claims and that evidence was considered by both the courts below, they cannot turn round and say that there was no proper pleading on that aspect.[5] Though there is no specific pleading or issue whether the landlord bona fide needed the premises, when the parties adduced evidence on that issue, finding on that issue, cannot be interfered with on the ground of absence of pleading.[6] In a recent decision the Supreme Court pointed out that want of pleadings or the raising of an issue would arise when a party has been put to prejudice. In a case where the facts are writ large and the parties go to trial on the basis that the claim of the other side is clearly known to them, we fail to understand as to how the law of pleadings would prejudice them. [7]

In a suit by the landlords the defendant's contention that there was only one landlord was upheld but the plaintiffs were not allowed to claim

1 *Mahafazul Rahim* v. *Babulal*, A 1949 Nag 113.
2 *Maheshwari Prasad* v. *Munni Lal*, A 1938 All 438.
3 *Shri Ram* v. *Thakur Dhan Bahadur Singh*, A 1965 All 223.
4 *Tukaram* v. *Govinda*, 95 IC 294, A 1926 Nag 385.
5 *Kali Caraseal Agarwalla* v. *Bharat Coking Coal Ltd.*, A 1989 SC 1530; *Bhagwati* v. *Chandrammal*, A 1966 SC 735.
6 *Sundar Singh* v. *Rajaram*, A 1991 MP 51; *Arvind* v. *Rear Admiral*, A 1985 Delhi 248.
7 *Bank of India* v. *Lekshimanidas*, 2000 (3) LW 346 SC.

that decree be passed in favour of one landlord on the admission of the defendant. It was observed that the defendant had set up a different contract of tenancy and plaintiffs could succeed on admission, only if liability was admitted without reservation.[8]

If neither party discloses the entire truth and the evidence adduced discloses a set of facts midway or different from the case set up by either party, the court is obviously bound to take notice of true facts and to give effect to legal rights which arise on that state of facts. Thus in a case the plaintiff claimed half share in a house alleging that it was joint property of his vendor and the defendant. The defendant's case was that the plaintiff's vendor had separated and lived in another house, that the defendant's grandfather lived in the house in suit, and that when it fell down, the defendant rebuilt it. The court found that the house had two portions, the front one occupied by the defendant's grandfather and the back portion occupied by the plaintiff's vendor, that the latter fell down and the plaintiff's vendor shifted to another village and defendant's grandfather built on the back portion more than 12 years ago. Held, that the suit could be dismissed on these facts.[9]

A plaintiff who claimed title by right of survivorship was not at a later stage permitted to claim decree as heir,[10] nor was a plaintiff who based his suit wholly on the allegation that the suit land was a burning ground allowed to contend at the trial that the land was also a graveyard,[11] nor was a decree allowed on the ground of possessory title when the proprietary title on which the claim was based not proved,[12] nor was a plaintiff suing as trustee for P permitted later to take the stand that he was suing in his individual capacity.[13] The decision of a case cannot ordinarily be based on grounds outside the plea of the parties and it is the case pleaded which has to be proved.[14]

8 *Parekh Bros* v. *Kartick Chandra Saha*, A 1968 Cal 532.

9 *Abdul Ghafoor* v. *Ram Sewak*, A 1925 Oudh 617.

10 *Kamalakant* v. *Madhvji*, 37 BLR 405, A 1935 Bom 343; *Thimmiah* v. *Narrayanappa*, 15 MysLJ 418.

11 *Ranglal* v. *Lakshmidhar*, A 1945 Pat 92.

12 *Redden* v. *Vadla*, A 1946 Mad 537; see however, *Karuppanam* v. *Sundara*, 1939 MWN 1179.

13 *Ram Chandra Das* v. *Hira Lal Modi*, A 1978 Orissa 172.

14 *Trojan & Co. Ltd* v. *Nagappa Chettiar*, A 1953 SC 235; *Raruha Singh* v. *Achal*

In the absence of pleading plaintiff was thus not allowed to rely upon an acknowledgement to save limitation,[15] nor in a suit on the basis of title to contend in appeal that he was in possession and had rights under section 53A, Transfer of Property Act.[16] The plaintiff was also not allowed to raise the plea of rights as a riparian owner in a suit for damages for diversion of water on the ground of title;[17] likewise, a riparian owner claiming gradual accretion to his alluvial land was not allowed to turn around at the hearing and contend that he was the owner of the whole river bed including the area in suit.[18]

In a writ petition by a dismissed employee, who in his petition had denied the very factum of disciplinary inquiry, was not allowed to contend at the hearing that the procedure at the inquiry held had been illegal and that he had not been given proper opportunity to lead evidence.[19] Where the husband had not put forward the plea of cruelty as a ground of relief in suit for dissolution of marriage under Hindu Marriage Act but included it later in replication which was filed after the wife had alleged that husband was having adulterous relations with his sister-in-law, no relief was granted on the ground of cruelty.[20] Such a course is indeed barred by O. 6, R.7 which lays down that no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.[1] The court may, however in exceptional cases take into consideration even a plea taken in a rejoinder or replication though not taken in the original pleading even without amendment of the latter if it is satisfied that no prejudice was caused to the other party which went to trial with full knowledge of it.[2] It is nevertheless always advisable to seek

Singh, A 1961 SC 1097; *S. Venkappa Devadiga* v. *Mahendra Narayan Singh*, A 1981 Pat 133; *Kishorilal* v. *Chaltibai*, A 1959 SC 504.

15 *Ram Padarath Thakur* v. *Harinarayan Pd.*, A 1965 Pat 224; see however, *Vidya Nath* v. *Coal Purchase Co.*, A 1971 Pat 229.

16 *Illikkal Devasavom* v. *Potta Kokat*, A 1966 Ker 96.

17 *Siv Ranade* v. *Union of India*, A 1964 SC 24.

18 *Balsu Ramalakshmamma* v. *Collector*, 26 IA 107, 22 M 464 (PC).

19 *Model Mills Nagpur* v. *State Industrial Court*, A 1967 Bom 382.

20 *Sulochna* v. *Ramkumar Chauhan*, A 1981 All 78.

1 *Viswapathi* v. *Venkata*, A 1963 AP 9 (DB) (para 20).

2 *Sri Subramania Pandarasannadi* v. *State of Madras*, A 1965 SC 1578.

a formal amendment of the original pleading instead of being content with an averment in such supplementary pleading.

In a suit for declaration and injunction, and in the alternative for possession, the plaintiff alleged that during his minority his mother was the guardian but in evidence he introduced his uncle-in-law as the person factually looking after his property. This variation between pleading and proof was discredited.[3] A plaintiff claiming title under a sale-deed, which the defendant pleaded was bogus, and the plaintiff could not prove, was not allowed a decree on the ground that he was *benamidar* for his vendor.[4] Where a plaintiff failed to prove the case of negligence set up by him, he was not allowed in the Appellate Court to ask the court to find negligence established on quite different *species facti*.[5]

In a suit based on pronote, defendant pleaded want of consideration, the consideration being unlawful and against public policy. The defendant's evidence related to some sort of breach of contract. This was held to be at variance with the defence and prejudicial to the other party.[6] Where the pedigree though made part of the plaint, was not denied by the defendant, the defendant was not allowed to succeed on the basis that the pedigree was incorrect.[7] In a Calcutta case, the plaintiff simply denied the genuineness of a deed of gift, but the trial court, while holding the document proved, rejected it on the ground that the transaction was extremely questionable. It was held on appeal that forgery and fraud being different pleas, the court should not have rejected the deed on ground not set up by the plaintiff.[8] Where the plaintiff alleged definitely a contract of particular date, he was not permitted to prove a contract of a different date.[9] When a sum is claimed as *Lambardari Haq*, it cannot be decreed as *Mukaddami Haq*.[10] In a suit for rent on the ground of *Kabuliyat*, where the *Kabuliyat* could not be proved the plaintiff was not allowed in second appeal to

3 *Hadu Parida* v. *Sama Govinda Misra*, A 1970 Ori 32.
4 *Bhushanchandra* v. *Manujendra Dut*, A 1940 Cal 148.
5 *Raymond* v. *Alice*, 63 MLJ 275, A 1932 PC 95, 136 IC 151.
6 *Indermal Tekaj Mahajan* v. *Ram Prasad Gopi Lal*, A 1970 MP 40.
7 *Mazhar Ali* v. *Gulam Murtujah*, A 1958 AP 8.
8 *Kalamjan* v. *Sahajana*, 111 IC 746, A 1929 Cal 77 DB.
9 *Jugal Kishore* v. *Paraslal*, A 1930 Lah 325.
10 *Bani Bai* v. *Mahadeo*, 106 IC 659 Nag.

support his claim on the principle of part performance.[11] In such a case, there is a conflict of an opinion on whether he can get a decree for damages for use and occupation without amending the plaint.[12] An ejectment suit on the basis of relationship of landlord and tenant where such relationship is denied and remains not proved by the plaintiff, but the plaintiff's title is established and the defendant's adverse possession for the requisite period is not shown, the court can decree the suit for possession if the defendant is not taken by surprise and matters regarding title are substantially touched in the issues and evidence thereon has been led without objection.[13]

It cannot, however be granted where no evidence was adduced nor issue raised on the question of title.[14] In the undernoted case,[15] even though the suit against a tenant for ejectment was dismissed a decree for rent from the date of suit to the date of decree was passed in order to avoid multiplicity of suits.

The Patna High Court has held that where the defendant pleaded an express contract of waiver of enhancement, and failed to prove it, the court cannot infer waiver from other circumstances.[16] Similarly, where plaintiffs definitely alleged that contracts were signed by B under express authority of the proprietors, it was held that they could not subsequently allege that B must be taken to have implied authority on behalf of the proprietors to enter in the contract.[17] These decisions may, however, require reconsideration in the light of the undernoted decision of the

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11 *Ganga Prasad* v. *Sukhdeo Sahu*, 100 IC 566 All.

12 *Triveni* v. *Ram Dass*, 105 IC 34 Nag (Yes); *Rangaraju* v. *Gedala*, 97 IC 935, A 1926 Mad 107 (No); *Paturi* v. *Ganapati*, A 1949 Mad 421 (No); *Bochoo* v. *Mohd. Umrao*, A 1940 Pat 555 (No but amendment may be allowed); *Kirpa Shanker* v. *Janki Pd.*, A 1942 Pat 86 (No).

13 *Bhagwati Prasad* v. *Chandramaul*, 1966 ALJ 799 (SC), A 1966 SC 735; *Abdul Ghani* v. *Mst. Babui*, 25 A 256 FB; *Balmukund* v. *Dalu*, 25 A 498 (FB); *Ponnia Pillai* v. *Pannani*, A 1947 Mad 282; *Jamaluddin* v. *Qazi Zamirul Hasan*, 1984 All LR 329; *Amulya Ratan* v. *Kali Pada*, A 1975 Cal 200 (Tenancy alleged in plaint not proved; ejectment as rank trespassers upheld).

14 *Kazi Taufiquor Rahman* v. *Elachi Bibi*, A 1973 Gau 139.

15 *Chiranjilal* v. *Ghanshyamdas*, 1983 MPLJ 595 (relying on *Girdharilal* v. *Hukam Singh*, A 1977 SC 129, (1977) 3 SCC 347).

16 *Kamandas* v. *Radhika*, A 1929 Pat 717.

17 *Ralli Bros* v. *Firm Bhagwandas*, A 1945 Lah 35.

Supreme Court [18] in which it was held that where compensation is claimed under an oral contract for work done for the defendant, and such oral contract is not proved, the court can grant compensation under section 70, Contract Act, on the basis of an implied contract. The Privy Council also, in a suit to enforce a mortgage where the mortgage was discovered after the institution of the suit to be void, granted relief under section 65, Contract Act, by way of restitution, although section 65 was not pleaded as a separate ground of claim in the plaint. Their Lordships held that a defendant who when sued for money lent pleads that the contract was void can hardly regard with surprise a demand that he restored what he received there under. They added that by allowing the plaintiff relief under section 65 no injustice could result to the defendant; on the contrary not to allow it would hardly be just.[19]

Their Lordships of Privy Council held in a case that a court has no jurisdiction, without amendment of pleadings, to consider and grant a declaration on the basis of a question which is not only in issue but which the party was precluded from argument due to his admission.[1] A party can only succeed on what was alleged and proved ("*Secundum allegata et probata*"). This is based mainly on the principle that no party should be taken by surprise by the change of case introduced by the opposite-party.[2] A party is, therefore, expected and is bound to prove the case as alleged by him and covered by the issues.[3] Having claimed a property as personally belonging to him, plaintiff was not allowed to claim it as one of the members of Joint Hindu family when he was not the manager of the family.[4] The ordinary rule is that evidence is to be given on a plea properly

18 *Subramanyam* v. *Thayappan*, A 1966 SC 1034; see also *Aries Advertising Bureau* v. *C.T. Devaraj*, A 1995 SC 2251 (on facts section 70 Contract Act found not applicable).

19 *Raja Mohan* v. *Manzoor Ahmed*, A 1943 PC 29 (See however, *Murlidhar* v. *International Film Co.*, A 1943 PC 34, in which case while a claim for restitution u/s 64, Contract Act was permitted to be raised amendment was insisted on, so that the defendant could claim equitable set off).

1 *Attorney General of Colony of Fiji* v. *J.P. Bayly Ltd.*, A 1950 PC 73.

2 *Indermal Tekaj Mahajan* v. *Ram Prasad Gopi Lal*, A 1970 MP 40.

3 *Bhohimder Singh* v. *Charan Singh*, A 1950 EP 256; *Afsar Sheikh* v. *Sulaiman Bibi*, A 1976 SC 163.

4 *Allam Gangadhaera Rao* v. *Golapalli Gangarao*, A 1968 AP 297.

raised and not in contradiction to it.[5] The true scope of the rule is that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another issue which was not in the minds of the parties and on which they had no opportunity of adducing evidence. But that rule has no application to case where parties go to trial with the knowledge that a particular question is in issue though no specific issue has been framed thereon and adduce evidence thereon.[6]

However, plea about the non-maintainability of a suit can be accepted without any specific plea or any precise issue.[7] In another case where conflicting claims were set up by the parties on the basis of two sale-deeds, the Supreme Court held that the court could hold that one of the sale deeds was contingent and was to take effect if the other sale was not completed, though there was no such plea.[8]

Every Variance not Fatal: But the only reason for this rule being that a party will be seriously prejudiced if his opponent is allowed to substantiate a case different from that pleaded,[9] every variance between pleading and proof is not necessarily fatal,[10] and a slight variance will not be regarded as such.[11] When the plaintiff claimed a house on the basis of a *patta* standing in his name and alleged that consideration was paid by him, he could be allowed to prove that though consideration was not paid by him, he was entitled to the house.[12] Where the plaintiff wife in the plaint alleged that the purchase money for the suit property was paid by her, but in evidence she stated that the purchase money was jointly paid by her

5 *Mohan Lal* v. *Anandi Bai*, (1971) 1 SCC 813; *Chandra Das* v. *Hiralal Modi*, A 1978 Ori 172.

6 *Nagu Bai* v. *Shama Rao*, A 1956 SC 593; *Kunju Kasavan* v. *M.M. Phillip*, A 1964 SC 164; *Union of India* v. *Khes Karanapura Colliery Ltd*, (1968) 3 SCR 784 (*re* : writ pleading.); *Kali Prasad* v. *Bharat Coking Coal Ltd.*, A 1989 SC 1530; *Rajbir Kaur* v. *S.Chokosin & Co.*, A 1988 SC 1845; *Ram Sarup Gupta* v. *Bishun Narain Inter College*, A 1987 SC 1242.

7 *State of Rajasthan* v. *Rao Raja Kalyan Singh*, A 1971 SC 2018.

8 *P.V. Ayyappa Reddian* v. *Ayyapan Janardhan Pilla*, A 1971 SC 2092.

9 *Gendi* v. *Joynal*, 26 CWN 294, 64 IC 565, 35 CLJ 103.

10 *Bankey* v. *Gudo*, A 1930 Pat 476; *Krishnaji* v. *Secretary of State*, A 1937 Bom 449; *Balram Das Agarwal* v. *Kesar Dev Khemka*, 71 CWN 51.

11 *Gulam* v. *Azim Bibi*, 139 IC 662, A 1932 Lah 570.

12 *Bhim Singh* v. *Kan Singh*, A 1980 SC 72.

and her husband out of her fund, it was held that as it is not uncommon to find husband effecting actually the operations on behalf of his wife, the plaintiff could not be non-suited on account of this variation in pleadings and proof.[13]

Every variance should be carefully watched to see that the opposite party is not taken by surprise,[14] as in all such cases, the real test is whether the other party has been taken by surprise,[15] and where there has been no surprise and parties have understood what each wanted to prove and what the real issue was and justice is better done by deciding the case on the merits as presented by the parties, this technical rule need not be enforced [16] and the defect in pleading may be remedied by amendment, if necessary.[17] The Supreme Court has held that the doctrine that relief should be founded on the pleadings of the parties should be applied in the light of the principle that considerations of form cannot override legitimate considerations of substance. Therefore, if a plea, though not specifically made, is yet covered by an issue indirectly or by implication and the parties knew that the plea was involved in the trial and led evidence about it, the objection that it was not pleaded is not maintainable.[18] On this principle, on failure of proof of tenancy a suit for possession was decreed on the ground of defendant's possession being by leave and license, as appearing even from defendant's stand.[19]

The Patna High Court has held that a plea not raised in pleading may be entertained at a later stage, sometimes even in appeal, provided there is no prejudice to the other party and all material facts to supply the basis of the plea are already on record.[20] Where even though a plea was not set

13 *Bhupendra Kumar R. Parikh* v. *M.K. Lakshmi*, A 1990 Mad 46 (DB).

14 *Danmmu* v. *Narasingha*, A 1940 Pat 187.

15 *Ratanshani* v. *Bannuji*, A 1925 Nag 434; *Krishnaji* v. *Secretary of State*, A 1937 Bom 449; *Chabilal* v. *Jharulal*, A 1971 Cal 540.

16 *Ananda Chandra* v. *Brojalal*, 50 C 292, A 1923 Cal 142 (DB); *Jugal Kishore* v. *Gomti*, 25 IC 280 All; *Ghulam* v. *Mahomed*, 144 IC 467, A 1933 Lah 342; *Ramdas Trust* v. *Damodar Das*, 1967 Raj LW 273; *Arvind Berry* v. *A.P.S. Bindra*, A 1985 Del 248.

17 *Motabhoy* v. *Mulji*, 13 ALJ 529, 39 B 339, 17 BLR 460, 17 MLT 402.

18 *K.C.Kapoor* v. *Radhika Devi*, A 1981 SC 2128, (1981) 4 SCC 487 (para 37).

19 *Bhagwati Pd.* v. *Chundramaul*, A 1966 SC 735.

20 *Vaidya Nath Sahai* v. *Ram Badan Singh*, A 1966 Pat 383; compare, *Kundan* v. *Kanhaiya*, A 1953 HP 91.

up in the pleading, the pleader for the party setting it up openly declared at the trial, to the knowledge of the other party, his intention to produce evidence in proof of that plea, the other party produced rebutting evidence, and the trial court considered and decided it, it has been held that the appellate court cannot shut its eyes to such a plea simply because it was not taken in the pleading.[1] The better procedure, however, is that the Judge should insist upon an amendment of the pleading and if necessary should direct further issues to be raised and further opportunity to be given to the other party to meet the altered case.[2] In case where the plaintiff raised a new case at the time of the hearing and led evidence in support of such new case and the defendant did not ask for an adjournment to rebut the new case set up by the plaintiff, it was held that the decision on such a new case was not vitiated.[3]

In a suit for declaration that an adoption made by the plaintiff, a widow, was null and void on the ground of fraud, it was alleged that she was made to sign the adoption deed on the representation that *pattas* had to be written, and she, relying on the word of the defendant who used to look after her business, and in the absence of any independent advice, signed the deed. It was held that the court could give relief even if it found a case of undue influence established instead of fraud.[4] Where plaintiff sued on the ground of title as owner, the court gave him a decree on the ground of possessory title when it was satisfied that the defendant was not taken by surprise and had a fair and adequate opportunity to meet the case,[5] but not when defendant is taken by surprise.[6] In a suit for prompt dower based on an express agreement, the question whether the court could pass a decree on the basis of Muhammadan Law or custom even if the agreement was not proved is the subject of conflicting decisions.[7] The

1 *Satgur* v. *Har Narayan*, 111 IC 817, A 1929 Oudh 44; *Budhulal* v. *Ram Sahai*, 9 OWN 523, 138 IC 808, A 1932 Oudh 244; *Goodhan* v. *Ali Bux*, A 1981 Raj 206.

2 *Nagardas* v. *Vali Mohd.*, 32 BLR 454.

3 *B.N. Railway* v. *Moolji*, A 1929 Cal 654; *Murtu* v. *Giari*, 1972 SLJ 209.

4 *Narayan Bhat* v. *Akkerbai*, 33 IC 576, 18 BLR 27; see also *Mohammad Ibrahim* v. *Umutulla*, 39 IC 798.

5 *Karuppanan* v. *Sundara*, 1939 MWN 1179, 110 LW 65.

6 *Kalulal* v. *Mannalal*, A 1976 Raj 108; see also, *Reddem* v. *Vadla*, A 1946 Mad 537.

7 *Mahbuban* v. *Muhammad*, 8 Pat 645, 117 IC 207, A 1929 Pat 207 (Yes); *Bhuri* v. *Asghari*, 94 IC 959 Lah (No).

High Court of Madras has however taken the view that whether the parties are Shia or Sunni, dower must be presumed to be prompt unless payment of the whole or any part of the dower is expressly postponed.[8] Where plaintiff claimed title to land as reformation *in situ* the court gave him a decree on the ground of accretion.[9] Where the defendant pleaded *res judicata* which is only a plea of estoppel by judgement, but circumstances disclosed on the record made out another species of estoppel, there may be no reasonable ground for refusing relief to him.[10]

In a suit for declaration that certain property belonged to A, having been allotted to him under a partition with his brother B, the defendant, a creditor of B, pleaded that it had been allotted to B. Both parties failed to prove their case and the court held the property to be joint. The Nagpur Court held that the relief could be given on this finding.[11] Where the question of adverse possession was not raised in the written statement but was urged without objection by the plaintiff in the trial court as well as in Appellate Court, no objection to the determination of that question could be taken in second appeal.[12] But this cannot always be allowed, especially when the plaintiff cannot get full relief against the defendant without impleading a new defendant.[13] Where a suit was brought under Section 68 (c), Transfer of Property Act, for mortgage money and it was found that there was an express provision for sale in the deed and the suit for sale could not otherwise be met on facts or law, it was held that it would be proper for the court, even in second appeal, to avoid multiplicity of suits, to grant a decree for sale under clause (a).[14]

In a suit against the Secretary of State for damages for breach of contract, the defence denied that the plaintiff had any legal claim or right, and the absence of a valid contract as required by Section 30(1)[15]

8 *Sheikh Md* v. *Ayesha Beevie*, 1937 (2) MLJ 779.
9 *Sarat Chandra* v. *Bhupendra*, 56 CLJ 263.
10 *Chiranji Lal* v. *Ram Kanwar*, A 1948 EP 26; *Zingu* v. *Mahadeo*, A 1948 Nag 358; compare, *K.C. Kapoor* v. *Radhika*, 1981 SC 2128 (plea of estoppel implied).
11 *Behari Lal* v. *Gore Lal*, A 1926 Nag 203, 90 IC 263.
12 *Sharavan* v. *Fattu*, 98 IC 911, 29 BLR 1357.
13 *Shib Ram* v. *Fakira*, 89 IC 103 All.
14 *Ramkumar* v. *Mahipal*, A 1928 All 188, 174 IC 292.
15 Now Art. 299, Constitution of India.

Government of India Act was not expressly pleaded, it was held that the latter plea could be allowed to be raised in appeal and could be made the basis of the decree.[16] In a suit for declaration of title based on a written conveyance, the writing was held to be inadmissible for want of registration and suit was therefore dismissed, though it was proved that plaintiff had paid the price and was in possession. The Lahore High Court held that plaintiff should have amended his plaint by changing the cause of action from one based on an actual transfer of title to one based on part-performance under a personal contract but that the absence of this amendment was not fatal and that the plaintiff should get a decree for declaration that he was lawfully in possession of the property which was delivered to him and over which he had a lien for purchase money paid by him.[17]

In a money suit, there was no averment in the plaint in what manner the suit was within time and how limitation was saved. However, one of the dates in the paragraph stating the cause of action was the same as the date of acknowledgment. There was also an issue whether the suit was barred by limitation. The Patna High Court, while rejecting the contention that the absence of a specific averment in the plaint that limitation was saved by acknowledgment, held that such an absence was a mere irregularity which caused no prejudice to the defendant.[18]

As a general rule a party to a suit can only succeed on the strength of his own case as made out expressly or impliedly in the pleading. He may also succeed on the basis of admission of his adversary but he cannot be allowed to take advantage of the weakness of the other party's case to his prejudice. Even though the plaintiff fails on the case that he made out in his plaint, he can still succeed on the case where liability is clearly admitted by the defendant without reservations.[19] Where the pleadings on a particular point were vague, but all facts were before the High Court, and the particular aspect of the case was fully argued without objection and the High Court considered and decided the point; the objection for

16 *Krishnaji* v. *Secretary of State*, A 1937 Bom 449.

17 *Shankri* v. *Milka Singh*, A 1941 Lah 407.

18 *Vidya Nath Mandal* v. *The Coal Purchase Company*, A 1971 Patna 229; see however, *Ram Padarath* v. *Harinarayan*, A 1965 Patna 224.

19 *Parekh Bros* v. *Kartic*, A. 1968 Cal 532

consideration of the point was not permitted by the Supreme Court.[20] No court has power to set up a new case for a party not involved in the pleadings, much less an inconsistent case. There must always be some foundation in the pleas in order to enable the court to grant a relief.[1]

A plaintiff shall succeed or fail on the basis of his own pleadings and evidence and not on the basis of any mistake committed by the defendant.[2] The court cannot make out a case inconsistent with the claim or the defence.[3] But in applying this rule not merely the relief clause but the whole plaint should be seen and the court should look at the substance and not merely the form.[4] A mere mention of a wrong provision of law is not, however, a good ground for refusal of relief if it can be granted under the correct provision.[5] A lesser

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20 *Union* v. *Khas Karanpura & Co.*, A 1969 SC 125.

1 *Sriniwas Ramkumar* v. *Mahavir Prasad*, A 1951 SC 177; *Nirakar Das* v. *Gourihari Das*, A 1995 Ori 270.

2 *Kannu Reddiar* v. *Palanirajan*, 1996 (1) MLJ 118 (Mad) (DB).

3 *Sheodhani Rai* v. *Suraj Prasad Rai*, A 1954 SC 758; *Kuppala Obul Reddy* v. *Narayan Reddy*, (1984) 3 SCC 447 (para 15); see also, *Maung Sin* v. *Maung Byang*, A 1941 PC 51 (Relief adjusted on issues indirectly raised in pleadings); *Appa Trimbak* v. *Waman Govind*, A 1941 PC 85 (As respondent not represented, it was not considered right to determine any matter not strictly within the pleadings and issues as they stood); *Nawab Ibrahim* v. *Umeatul Zohra*, 19 All 267 PC; *Lutufullah* v. *Mohd. Siddiq*, A 1946 Sind 117 (case law discussed).

4 *Janakirana Iyer* v. *Nilkanta*, A 1962 SC 633; *Kedar Lal* v. *Hari Lal*, A 1952 SC 538; *C. Abdul Shakoor* v. *Arji Papa Rao*, A 1963 SC 1150; compare, *Shipping Corporation* v. *Nissar Export Corporation*, (1981) 1 SCC 564 (whole of written statement seen for holding that a particular averment of plaint was denied though inadvertently particular para not mentioned as denied).

5 *Raja Shatrunji* v. *Azmat Ali Khan*, 1971 Rev. Decns. (UP) 197 SC (Application given under wrong provision treated as under correct provision) compare, *Titaghur Paper Mills* v. *Orissa State Electricity Board*, (1975) 2 SCC 436, *Malik Ahmad Wali Khan* v. *Shamsi Jehan Begam*, 28 All 482, 33 IA 81 (PC); *Shanti Devi* v. *Amar Kumar Banerjee*, (1981) 2 SCC 199 (para 4) (wrong averment of law cannot alter true character of deed); *Haji Abdulla H.A.S. Dharmasthapanam* v. *T.V. Hameed*, A 1985 Ker 93 (DB) (where the substance of a section is disclosed in the pleading, omission to mention Section is immaterial); *S. Mallaiah* v. *Eisther*, 1994(2) ALT 356 (AP) (DB); *M. Seshireddy* v. *Subba Reddy*, 1995(3) ALT 635 (AP) (Quotation of wrong provision of law is no ground for rejection of a petition. It is the substance and not the form which has to be seen); *Yashoda Devi* v. *B.Dayakar Reddy*, 1994 (3) ALT 10(DB).

relief than one claimed can always be granted[6] unless it would be inconsistent with the plaintiff's pleading or would cause prejudice to defendant.[7] Where necessary facts have been stated in the plaint, the court can grant appropriate relief even though the relief in the plaint may have been inartistically drafted.[8] It is the duty of the court to mould the relief to be granted to the parties according to the facts proved, which, however, should not be inconsistent with the pleadings.[9]

Court not to Set up New Case : The court should, however, not set up an entirely new case which was never presented by the parties, nor should draw an inference inconsistent with the case set up by the parties,[10] but the determination of the case should be founded upon a case either to be found in the pleadings or involved in, or consistent with, the case thereby made.[11] Where a claim has never been made in the defence presented, no amount of evidence can be looked into upon a plea which has never been put forward.[12] As this principle applies even at the trial stage, undoubtably such a new question of fact could not be entertained at any appellate stage.[13] The rule applies to the appellate as well as to the trial court and it has been held that a conclusion of the Appellate Court which is based on

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6 *Ashok Kumar* v. *Usha Rani*, (1985) 1 CCC 113 (Delhi); *Laxman* v. *Gangabai*, A 1955 MB 138.

7 *Ammalu* v. *Namagiri*, A 1918 Mad 300, 43 IC 760.

8 *Babulal* v. *Bindhyachal*, A 1943 Pat 305.

9 *Mehar Chand* v. *Milkhiram*, A 1932 Lah 401 (FB); *Kesavelu Naidu* v. *Doraiswamy Naidu*, 1958 (2) MLJ 189.

10 *Malaraju* v. *Venkatadri*, 59 IC 767, 19 ALJ 97, 33 CLJ 171, 40 MLJ 144, 23 BLR 713 PC; *Ramjiwan* v. *Mt. Maharani*, A 1936 Nag 295; *Arb Jhanglu* v. *Panjalshah*, A 1938 Sind 198; *Deo Narain* v. *Kamta*, 171 IC 174, A 1937 Nag 143; *Gopalsingh* v. *Sheokumar*, 169 IC 954, A 1937 Nag 85; see however, *Beharilal* v. *Gorelal*, A 1926 Nag 203; *Sheodhari* v. *Suraj Prasad*, A 1954 SC 758; *Gobind Prasad* v. *Mst.Kulwanti*, A 1985 Pat 31 (see also Chap. XIV under heading "Court's power to grant different relief")

11 *Isharchander Singh* v. *Shamacharan*, 11 MIA 7 at 20; followed in, *Kanda* v. *Waghu*, A 1950 PC 68 (para 11).

12 *Siddi K. Mohd. Shah* v. *M.I. Saran*, A 1930 PC 57; *Ishar Fatima* v. *Anwar Fatima*, 182 IC 801 (2), A 1939 All 348; *Chander Kali Bai* v. *Jagdish Singh*, A 1977 SC 2262, (1977) 4 SCC 402.

13 *Bhagat Singh* v. *Jaswant Singh*, A 1966 SC 1861; *Bachan Singh* v. *Dhain Das*, A 1974 SC 708; *Chander Kali* v. *Jagdish Singh*, A 1977 SC 2262.

nobody's pleading and on nobody's responsibility for any such pleading cannot be supported in second appeal,[14] and where a plea of joint family status was not raised in the plaint but was entertained in appeal for the first time, the High Court interfered in second appeal.[15] Where a suit for partition on the allegation that the parties were members of a joint Hindu family was dismissed on the ground that there had been separation, the Appellate Court refused to allow a decree on the basis of an agreement under which plaintiff was entitled to a share.[16]

In a case where the only issue was one of priority between a mortgage and a *takavi* advance, the court was held to be wrong in holding that the *takavi* had not been given for the benefit of the property,[17] a point never raised by the parties. In another case, a zamindar sued for possession, alleging that W was his tenant who had lost his right as he had sold his holding. Defendant pleaded that it was W's father who was the original tenant, and as his other heirs were still tenants, the zamindar had no right of re-entry. The court found that W's father was the tenant but that by subsequent conduct on the part of the other heirs, W alone had become entitled to the holding. It was held that the court was not entitled to set up this new case.[18] Where the plaintiff sued for joint possession alleging that his cattle grazed on the land, and the court, finding the title not proved, gave a decree for grazing rights, it was held that such an inconsistent case could not be established.[19] Similarly, a finding that the plaintiff was an occupancy tenant in a suit in which he had pleaded that he was a subordinate tenure-holder was not held good.[20]

In suit for declaration of a customary right of taking out a procession with music, decree was not given on the basis of common law right of a citizen when the plaintiff failed to prove the pleaded customary right.[1] If a similar claim is based on easement, decree cannot be given on the ground

14 *Joti Prasad* v. *Baru Singh*, 132 IC 426, A 1931 All 219.
15 *Gauri Shankar* v. *Thakur Mewa Ram*, A 1931 All 600, 131 IC 513.
16 *Narayanamurti* v. *Satyanarayna*, 168 IC 98, A 1937 Mad 122.
17 *Munshi Babu Ram* v. *Babu Ram*, 66 IC 620, 9 OLJ 343.
18 *Joad Ali* v. *Srimati Rai Kishori*, 85 IC 753 Cal.
19 *Mahmood Shah* v. *Fatha*, 53 IC 43 Lah.
20 *Badr-ud-din* v. *Herajatulla*, 54 IC 979 Cal.
1 *Muchumarri* v. *Yerravullu*, 93 IC 226 Mad.

of customary right.[2] Where in a suit for demolition of defendant's wall built in front of plaintiff's door, the plaintiff could not prove his easement of way through that door, the court was held not entitled to declare that the plaintiff could open another door as easement of necessary.[3] In a suit for possession of a *takia*, well and mosque on the ground of ownership being dismissed, plaintiff was not allowed to plead in appeal that the property was *waqf* and that he was the *mutawalli*,[4] nor was a plaintiff who sued as a *mutawalli* for possession of a mosque property wrongfully alienated, allowed a decree on the ground that he was a worshipper, on failure to prove that he was a *mutawalli*.[5] Where in a case under section 3 Charitable and Religious Trusts Act, the applicant alleged that a certain *math* was a public endowment and a certain temple situate within its precincts was a public temple, and the non-applicants did not dispute these facts, the court was not competent to hold on the evidence of some witnesses that the temple was under the control and management of the *mahant* of the *math*.[6] In a Punjab case, the plaintiff claimed as donee from the owner or by adverse possession, and the court found that he was donee from the widow of the owner's son, who had herself taken possession without title, it was held that the plaintiff could not rely on adverse possession of the widow followed by his own adverse possession.[7] Where an estoppel was pleaded on the basis of a particular compromise, the court could not find an estoppel on the basis of another compromise.[8] Where defendant did not plead wager, held that it was not proper for the court to base its judgment on any such hypothesis.[9] A new plea regarding waiver is not ordinarily allowed to be taken for the first time in argument if it is not raised in the written statement.[10]

Where plaintiff sued as partner, which fact was found against him, he could not succeed on the ground that he had obtained the right of a partner

2 *Baldeo Bind* v. *Sheikh Abdul Aziz*, A 1948 Pat 425.
3 *Laldin* v. *Abdul Ghani*, 8 LLJ 547, 27 PLR 771, 99 IC 922, A 1927 Lah 36.
4 *Sharaf Din* v. *Mokham*, 33 IC 748; *Pitam* v. *Kallu*, 42 PLR 94.
5 *Debendranath* v. *Shefatulla*, 99 IC 205, 42 CLJ 339.
6 *Ram Kishorelal* v. *Kamalnarain*, A 1947 Nag 87.
7 *Jhanda Mal* v. *Gopal Das*, A 1925 Lah 519.
8 *Shera* v. *Gahana*, 106 IC 474 Lah.
9 *Mukat* v. *Gulab*, 1931 ALJ 363, A 1931 All 229, 131 IC 422.
10 *State of Bihar* v. *S.S. Devi*, A 1972 Pat 220.

by assignment.[11] In a suit by a commission agent against the State and the principal for price of the goods seized by the government, the agent did not claim lien over the goods in the plaint. It was claimed in arguments in Supreme Court but the argument was not accepted as it amounted to variance between pleading and proof.[12]

Where the plaintiff brought a suit for account against the defendant as agent in respect of a partnership transaction. the court was held incompetent to give a decree for account of partnership on the finding that the plaintiff and defendant were partners.[13] Similarly, in a suit for dissolution of partnership a decree for partition was not passed.[14] A plaintiff brought a suit for challenging a widow's transfer on the allegation that he was the next reversioner. It was found that there was a nearer reversioner. The plaintiff was not allowed to rely on the latter's alleged refusal to sue,[15] or, on his collusion with the widow.[16] A plaintiff having alleged a particular custom, was not allowed to prove another custom.[17] In a suit to set aside a decree on the ground of guardian's fraud and collusion, the court was held incompetent to consider the guardian's negligence, when fraud and collusion were not proved.[18] When a wife brought a suit for maintenance on the ground of her chastity and her husband's misconduct and both were disproved, she was not allowed to fall back on a plea of her infidelity and subsequent reformation which was neither advanced nor supported by evidence.[19] Where a plaintiff admitted that a certain deed was merely an agreement for sale and set up a subsequent oral sale, held that it was not open to the court to hold contrary to the pleadings that the deed was a complete sale.[20]

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11 *San Kauk* v. *Maung Po*, 101 IC 367, 5 Bur LJ 233.

12 *Ram Prasad* v. *State of M.P.*, A 1970 SC 1818.

13 *Krishnaswami* v. *Jayalakshmi*, 54 M 671, 31 MWN 497, 130 IC 766, 60 MLJ 315, A 1931 Mad 300.

14 *Tajammul Husain* v. *Ahmad Ali*, 167 IC 839, A 1937 Oudh 438.

15 *Sitasaran* v. *Jagat*, 102 IC 296 All.

16 *Bigan Kuer* v. *Radha*, A 1950 Pat 585, 190 IC 196.

17 *Mohammad Masooq Ali* v. *Harunnissa*, 114 IC 113, A 1926 Oudh 204.

18 *Bhaglu* v. *Ram Avtar*, 162 IC 178, A 1936 Pat 442.

19 *Jeeva Ammal* v. *Ranganatha*, 50 LW 200, A 1939 Mad 788.

20 *Jiwan Mal* v. *Allah Jawaya*, A 1931 Lah 595, 133 IC 646.

The rule, generally speaking, is that the court cannot grant relief to the plaintiff on a case for which there was no foundation in the pleadings and which the other side was not called upon or had an opportunity to meet.[1] But when the alternative case which the plaintiff could have made was not only admitted by the defendant in his written statement but was also expressly put forward as an answer to the claim which the plaintiff made in the suit, there would be nothing improper in giving the plaintiff a decree upon the case which the defendant himself makes.[2] Again, the court can and ought to take notice of the altered circumstances since the institution of the suit and mould the relief accordingly in order to shorten litigation and to do complete justice between the parties.[3] Even the appellate court can do so under O. 41, R. 33 *(This topic is elaborated later in this chapter under the heading 'Subsequent Events').*

A plaintiff setting up an easement cannot in second appeal set up a grant or custom as the basis of his claim.[4] A dispute between the plaintiff and his brother's widow in mutation proceedings was settled by an agreement that the widow should take 1/4th share. Afterwards the plaintiff sued the widow for recovery of possession of the 1/4th share on the ground of title, ignoring the agreement. The lower court maintained the agreement and dismissed the suit. The plaintiff was not allowed to argue in appeal that under the agreement itself the widow had only a life interest.[5] In a suit for enhancement of rent the plaintiff alleged a customary rate but failed to prove it. He was not allowed to ask the court to determine a fair rent.[6] In a case plaintiff sued for recovery of deposit alleging several previous demands without specifying any dates and a final demand within three years of suit but defendant denied the deposit and also all demands. On the plaintiff's witness stating in cross-examination that a demand was

1 *Mohanlal* v. *Anandibai*, (1971) 1 SCC 813; see also, *Kaniz Fatima* v. *Shah Naim Ashraf*, A 1983 All 450; *Babulal* v. *Motilal*, A 1984 All 378.

2 *Srinivas Ramkumar* v. *Mahabir Prasad*, A 1951 SC 177; (see Chapter VII ante and other decisions cited on this topic in this Chapter earlier).

3 *Satish Chand* v. *Govardhan Das*, (1984) 1 SCC 369 (para 5); relying on *Pasupuleti Venkateshwarlu* v. *Motor & General Traders*, A 1975 SC 1409, (1975) 1 SCC 770; *Rameshwar* v. *Jot Ram*, A 1976 SC 49.

4 *Ganpat* v. *Lalman*, 100 IC 21 Nag.

5 *Ram Charan* v. *Mst. Sartaji*, A 1926 Oudh 22, 90 IC 766.

6 *Satindra* v. *Bama Sundari*, A 1926 Cal 432, 88 IC 512 (DB).

made more than three years ago, the court dismissed the suit as time-barred. It was held that the court had no power to do so.[7]

Where the illegality of a transaction was shown to the court, the Madras High Court refused to give relief on it even though the illegality was not pleaded,[8] or the objection was taken at a very late stage.[9] Similarly, where illegality appeared from plaintiff's own admission, it was held that the court was bound to take notice of it.[10] But in a suit for royalty at increased rate which was payable only in a certain contingency, the defendant who had made payments at that rate for some time but who denied his liability to increased rate and claimed that the over-payments should be set off against the money really due, was not allowed to set up the nature of the mistake under which the payment was made as he had not specifically pleaded that the payment was made under a "*mistake of fact*".[11]

It has been held by Nagpur High Court that if there is any question of statutory requirement which compels the doing of a thing, the courts must take note of that fact, even though not pleaded.[12] In another case, the Madras High Court held that if the facts found by court give rise to a particular situation in which the law provides that certain consequences should follow, the court should apply the law though the parties did not specifically raise the plea. In that case in a suit against three persons on a pronote one defendant denied execution but the other two admitted it, setting up other defence, and the court found the signature of the former to have been forged, it was held that the whole pronote became void under section 87, Negotiable Instruments Act, and no decree should be given even against the other two defendants.[13]

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7 *Puttu* v. *Vidya Ram*, A 1934 All 10.

8 *Lakshmiyya* v. *Murahari*, A 1930 Mad 547.

9 *Abdulla* v. *Guruappa*, A 1944 Mad 387.

10 *Alice Mary Hill* v. *Clarke*, 27 A 266, 1 ALJ 632; *Mulchand* v. *Khem Chand*, 118 IC 202 Sind.

11 *Shiva Prasad* v. *Maharaja*, A 1943 Patna 327.

12 *Radha Kisan* v. *Jamna Das & Co.*, ILR 1941 Nag 702.

13 *Rangayya* v. *Sundaramurty*, A 1943 Mad 511; compare, *State of Madhya Pradesh* v. *Forest Product Co.*, 1984 MLPJ 431 (where necessary facts regarding illegality of contract are available in plaint itself, defendant can rely on it even though plea of illegality not raised in written statement; case law discussed).

In the case where the plaintiff had put in the plaint all the facts on which he based his claim without deducing the legal position properly from those facts and thus based his suit on a wrong cause of action it was for the court to apply the correct legal principles and give the plaintiff that which is due to him.[14] In an English case although the plaintiff had filed the suit on a plea of negligence and had failed to establish negligence, yet it was held that the court could give relief on the ground that defendants were guilty of trespass when that clearly appeared from the facts alleged by the plaintiff (as it was observed that the plaintiff was not bound to state the legal effect of the facts on which he relied) and when the defendants had not suffered an injustice in the way of being shut out from giving evidence. The action was treated as one of trespass.[15] The sole object of pleadings is that each side may have an opportunity of bringing forward evidence appropriate to the issues and so long as the result is obtained an issue cannot be objected to on the ground that it was not prominently raised in the first instance.[16]

In a suit for specific performance and recovery of earnest money as damages against the contracting party and his joint sons, the former died and the High Court passed a decree, against the sons, for the earnest money on plaintiff giving up his prayer for specific performance, merely on the finding that the father had received the money and inspite of the trial court holding that the contract was made without necessity. The Privy Council dismissed the suit, remarking that the character of the suit was not altered by giving up the prayer for specific performance, and refused leave to amend the suit into one for money had and received.[17] In another case for specifc performance and in the alternative for return of earnest money, where the contract was not proved but it was proved that the defendant had received the money, it was held that the plaintiff was not entitled even to recover the same.[18]

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14 *Adhilakshmi* v. *T. Nallaswin*, A 1944 Mad 530.

15 *Konakier* v. *Goodman*, (1918) 1 KB 42; cited with approval in *Ram Chandra* v. *Chinu*, A 1944 Bom 76.

16 *Sayed Muhammad* v. *Fatteh Muhammad*, (1894) 22 IA 4 (PC).

17 *Ram Saran* v. *Mahabir*, 100 IC 56, 25 ALJ 74, 6 Pat 323.

18 *Bengal Coal Co.* v. *Prosanna Kumar*, 45 CLJ 110, 134 IC 921.

NOTICE u/s 80 C.P.C.: In a suit against government, although the allegation of due service of notice under section 80, C.P.C. not having been denied the defendant was held not to be entitled to adduce evidence to show that proper notice was not served, yet it was held in one case that if the notice produced by the plaintiff himself showed that it was not in conformity with the requirements of section 80, the court was bound to take notice of the defect and refuse to entertain the suit on the ground that the mandatory provisions of law had not been complied with.[19] This case proceeded on the ground that notice under section 80 cannot be waived; but as it is now settled that notice, though mandatory,[20] can be waived [1] a plea of want of notice may be disallowed if taken at a very late stage.[2]

Negotiable Instruments and Original Debt : Where a suit was brought on a *hundi*, decree cannot be passed on the debt,[3] nor can a suit, fought in two courts on the basis of a promissory note be remanded in second appeal to see whether the plaintiff succeeded in proving the original debt;[4] it is, however, always open to the plaintiff to claim alternative relief on the basis of the original debt,[5] if the loan was independent of the promissory note[6] and if the instrument was not

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19 *Governor-General in Council* v. *Amilai*, A 1947 Pat 81, 250 IC 274; compare, *Secretary of State* v. *Sagarmal*, A 1941 Pat 517.

20 *Bihari Chowdhary* v. *State of Bihar*, (1984) 2 SCC 627; see however, *Ghanshyam Das* v. *Dominion of India*, (1984) 3 SCC 46, (substantial compliance enough).

1 *Dhian Singh* v. *Union of India*, A 1958 SC 274; *Velleyan Chettiar* v. *Province of Madras*, A 1947 PC 1974, 7 IA 223.

2 *Wasaint Shripat* v. *G.M. Khandekor*, A 1949 Nag 25; *Union of India* v. *Tej Narain*, A 1957 MB 108.

3 *Chhotey Lal* v. *Girraj Kishore*, 93 IC 63 All; *Sambasiva Rao* v. *T. Balakotaiah*, A 1973 AP 342 (FB);

4 *Mst. Thakurian* v. *Tota Ram*, A 1926 Oudh 40.

5 *Firm Sadasuk Janki Das* v. *Sir Kishen Pershad*, A 1918 PC 146; see also *T. Chandari* v. *Kambrath Kanarakutty*, A 1990 Ker 122; *Kallappa Pundalik Reddi* v. *Laxmibai Dattaba Vellaram*, A 1995 Bom 160.

6 *Bollam Venkataiah* v. *Venkata Reddy*, A 1985 AP 26; *Chaudhari Karan Singh* v. *Lal Singh*, A 1933 All 109; see also, *Rajivbhai* v. *Ranchhod*, A 1930 Bom 66; *Baburam* v. *Ochhelal*, A 1954 MB 117; *G.A. Sundara Iyer* v. *Arumugam Pillai*, A 1954 Mad 520; *Ghulam Mohd.* v. *Habibulla*, A 1966 J & K 127.

given in discharge of the loan[7] but merely as collateral security [8] or as conditional payment.[9]

The exceptions to the rule of *secundum allegata et probata* have thus been aptly summarised as follows :

"(a) when the new case involves only a pure question of law arising on admitted or proved facts;

(b) where the party entitled to object to the new case has waived his objection expressly or by his conduct in adducing evidence against the new case;

(c) where the main or cardinal question was in controversy between the parties and a variance in a subordinate detail or particular is not such as to cause surprise or prejudice to the party concerned".[10]

As to the power of court to grant a relief different from that claimed see Chapter XIV, post.

Subsequent Events [11] : Ordinarily, the decree in a suit should accord with the rights of the parties as they stand at the date of its institution. But where it is shown that the original relief claimed has, by reason of subsequent change of circumstances, become inappropriate, or that it is necessary to have the decision of the court on the altered circumstances (including a change either in fact or in law) in order to shorten litigation or to do complete justice between the parties, it is incumbent upon the court to take notice of events which have happened since the institution of the suit to mould its decree according to the circumstances as they stand at the time the decree is made.[12] Leave to amend the pleadings may be granted for this purpose. Courts often take notice of such events

7 *Lakshmi Narain* v. *Aparna Devi*, A 1953 All 535; *Sheikh Akbar* v. *Sheikh Khan*, (1881) 7 Cal 256.

8 *Kshitish Chandra* v. *Raj Kishore*, A 1980 Ori 10; *Abdul Md. Khan* v. *Mahananda*, A 1931 Pat 293; *Subramaniam* v. *Muthia*, A 1984 Mad 215; following, *Salig Ram* v. *Radhey Shyam*, A 1931 All 560.

9 *Sheonath Prasad* v. *Sanjoo Nenia*, A 1943 All 220 (FB); see also, *Bishambher* v. *Vishwanath*, A 1985 All 12 (case-law discussed).

10 *Lulufullah* v. *Md. Siddiq*, A 1946 Sind 117; *Bhim Singh* v. *Kan Singh*, (1980) 3 SCC 72, A 1980 SC 727; *Kidar Lal* v. *Hari Lal*, A 1952 SC 47.

11 Refer also Chap. X, under heading 'Subsequent Events'.

12 *Pasupuleti Venkateswarlu* v. *Motor & General Traders*, A 1975 SC 1409.

and even of events occurring during the pendency of appeal and permit pleadings to be amended for including a prayer for relief on the basis of such events.[13] This doctrine is of an exceptional character and is applied to avoid multiplicity of proceedings or to do complete justice between the parties, or when the original relief claimed has, by reason of change in the circumstances, become inappropriate.[14] In a suit for declaration that the impugned order of compulsory retirement was invalid and claim for salary till the date of superannuation, the court was entitled to take notice of superannuation in order to do complete justice and to avoid multiplicity of litigation.[15]

Difficulty often arises in regard to application of this principle to cases where the plaintiff's suit would be wholly displaced by the proposed amendment and a fresh suit by him would be barred by limitation. The power to allow such amendment does exist but is exercised only in exceptional circumstances and not normally.[16] In cases where it would not be so barred different considerations might come into play.[17] Thus, if a suit for redemption is premature, the Madras High Court held that it cannot be decreed because the period of mortgage has expired during its pendency.[18] But in Lahore, Patna and Peshawar a contrary view has been taken and the suits have been decreed.[19] A suit for removal of trustee cannot be decreed according to the Calcutta High Court on the ground of the latter's denial of the *debutter* nature of the property

13 *Sashi Bhushan* v. *Tulsi Charan*, 4 DLR (Cal) 81; *Bhanu Prakash Agarwal* v. *Munnalal Bhanu*, A 1979 MP 157.

14 *Banwarilal* v. *Shaikh*, A 1940 Pat 204, 188 IC 337; *Mandli Prasad* v. *Ram Charanlal*, A 1948 Nag 1; *Meghaji Mohanji Thakkar* v. *Anant Pandurang Chattre*, A 1948 Bom 396, 50 BLR 274; *Netai Chandra Ghosh* v. *Gour Mohan Ghosh*, A 1976 Cal 58; *Rameshwar* v. *Jot Ram*, 1976 SCR 847, A 1976 SC 49.

15 *Ramanugrah Jha* v. *State of Bihar*, A 1966 Pat 97; compare, *Gulzar Ahmad* v. *U.P.Govt.*, 1950 ALJ 212 at 223; *Laxmibai* v. *Waman Rao*, A 1953 Bom 342.

16 *Charan Das* v. *Amir Khan*, A 1921 PC 50, 57 IC 606; *Laxman* v. *Nanabhai*, A 1964 SC 11; *Pirgonda Hongonda Patil* v. *Kalgonda Shindgond Patil*, A 1957 SC 363 (para 10); *L.J. Leach & Co. Ltd.* v. *Jardine Skinner & Co.*, A 1957 SC 357 (para 16).

17 *Zahur Din* v. *Jalal Din*, 1944 Lah 319.

18 *Rangayya* v. *Basana Simon*, 94 IC 639, A 1926 Mad 594.

19 *Kuldip* v. *Md. Hashim*, A 1928 Pat 396; *Tulsiram* v. *Dinanath*, A 1926 Lah 145 DB; *Ghulam Md.* v. *Rahmat*, A 1926 Pesh 33.

in the written statement.[1] The Lahore High Court has taken a contrary view and held that a decree should be passed in such cases.[2] In another suit, the Madras High Court has also passed a decree for a sum to which the plaintiff became entitled on the date of decree though he was not entitled to it on the date of suit,[3] and where a suit to recover possession was filed a month before the lease term expired, it was held that the suit need not be dismissed as premature.[4]

Where a plaintiff in a declaratory suit acquired during the pendency of the suit the right to ask for some consequential relief, it was held that he was entitled to the declaration although it was open to him to ask for leave to amend the plaint and claim the consequential relief.[5] The same High Court refused relief to a party of the right which existed at the date of the suit when that right did not continue to exist but was lost before the relief could be granted. In that case a money decree-holder who had attached a mortgaged property was impleaded by the mortgagee in his suit but was released by the court as unnecessary party. He filed a revision against this order, but before the hearing of the petition, he purchased the property in execution of his decree and also in execution of the mortgage decree, and thus it remained no longer necessary to give him the relief he claimed in the revision, viz. that he should be impleaded in the mortgagee's suit.[6] In an Allahabad case where one of the two lessors had brought a suit for his share of rent and the defendant pleaded that he had paid the whole rent to the co-lessor, it was held that the payment was collusive and though plaintiff could not institute a suit for portion of the rent, yet his suit should be decreed on the ground that according to defendant's case the co-lessor's share of rent has been paid off.[7]

It is the duty of the court to mould its decree so as to suit altered circumstances.[8] In a case, defendant's land was acquired under Land

1 *Kali Kumar* v. *Ananda*, 108 IC 589 Cal.
2 *Kanshi Ram* v. *Jaimal*, 75 IC 562 Lah; *Dera* v. *Basti*, A 1940 Lah 194, 188 IC 616.
3 *Vaddadi* v. *Doddi*, 93 IC 955, A 1926 Mad 377, 1926 MWN 9.
4 *A. Suleman* v. *Abdul Shakur*, A 1950 Nag 99; *Sangeshar* v. *Asib Lal*, 190 IC 675.
5 *Mammad* v. *Neerarayan*, 1929 MWN 165.
6 *Annamalai Chettiar* v. *Srinivasagva Iyengar*, A 1938 Mad 293, 178 IC 595.
7 *Joti Bhushan* v. *B.N. Sarkar*, A 1945 All 311.
8 *Ram Chandra* v. *Mst. Bibi*, A 1945 Pat 369; *Bishwanath Singh* v. *Mujataba Husain*, A 1941 Oudh 422, 195 IC 402.

Acquisition Act and leased out to Railway Co., but defendant did not part with possession and government brought a suit for ejectment. The suit was dismissed as the Railway Co., and not government was held entitled to present possession. During the pendency of the appeal the management passed into the hands of the government and the Appellate Court held that court could take notice of this fact and give a decree for possession to the government.[9] *(For further discussion on amendment of pleading see Chapter X, post).*

Where in a suit by a *de facto* shebait, his competency to bring the suit was questioned, the court was allowed to take into consideration the facts of plaintiff having become *de jure* shebait during the pendency of the suit.[10] So, when one of the two mortgagees sued on the mortgage and the other died during the pendency of the suit, it was held that plaintiff should be given a decree, though on the date of the suit he was not entitled to one.[11] It has been held that in partition suits the rights of the parties should be finally settled having regard to events accruing up to the date of the decree.[12]

The court should, in any case, take into consideration such patent facts as a compromise between the parties.[13] In cases for dissolution of marriage, courts can take notice of grounds furnished during the pendency of proceedings provided a duly verified statement is furnished showing such grounds and petitioner's non-collusion and non-connivance.[14] In petition for divorce, the Court can take notice of subsequent events.[15]

In one case D, owner of a machinery, had hypothecated it to P, and afterwards sold it to M, who had agreed to pay the money due to P. P sued for declaration and injunction to protect his possession against

9 *Tej Narain* v. *Governor General*, A 1947 Pat 263.

10 *Sri Chandra* v. *Upendra*, 54 CLJ 544.

11 *Sarju Pd.* v. *Badri Pd.*, A 1939 Nag 242.

12 *Mst. Ghulam* v. *Abdul Aziz*, A 1933 Sind 371.

13 *Meyappa* v. *Seerthachi*, 171 IC 145, A 1937 Mad 200.

14 *Visla Duncan* v. *George Duncan*, 184 IC 801, A 1939 Rang 352.

15 *Ramesh Kumar* v. *Kesho Ram*, A 1992 SC 700; *Hasmat Rai* v. *Raghunath Prasad*, A 1991 SC 1711; *K. Lalitha Kumari* v. *Ramprasada Rao*, 1992 (2) ALT 631; *Sriram Mahadev* v. *Sriram Yadabai*, 1995 A.I.H.C. 1983 (AP) (DB).

interference by M, and claimed in the alternative his money which had not then become due but became due by the first hearing of the suit. The court gave a decree for the money as a matter of justice, though the right to call for the money had not accrued on the date of suit.[16]

The Appellate Court, like the trial court, is not only entitled but bound to take notice of events and changes in the legal position arising after the decision of the original court for doing justice between the parties. This is so because an appeal is in the nature of a rehearing of the original case.[17] Where plaintiffs who had sued on a mortgage claiming to be heirs and representatives of the original mortgagee on the basis of a will executed by the latter in their favour and the High Court dismissed their suit holding that the will had not been properly attested, applied for probate of the will and obtained it in their favour during the pendency of appeal in the Supreme Court, the probate was taken into consideration in the Supreme Court and on its basis the suit was decreed.[18] In another case where a provision of law had been amended with retrospective effect during the pendeney of the appeal, effect was given to the amended provision by the Supreme Court.[19] So also where one notification which gave the plaintiff a right to claim ejectment had been cancelled during the pendency of the litigation by another notification taking away that right, effect was given to the latter notification on the ground that the court was bound to apply the law as it found it on the date of its judgment.[20]

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16 *Kimat Rai* v. *Mangha Ram*, A 1943 Sind 182.

17 Per *Bhagwati*, J in *Chunnilal Khushal Das* v. *H.K. Adhyarn*, A 1956 SC 655, 1956 SCJ 685; *Chandika Singh* v. *The Board of Revenue*, 1956 ALJ 883; *Punjab Co-operative Bank* v. *Amrik Singh*, 1964 ALJ 1008, A 1966 All 216.

18 *Surinder Kumar* v. *Gian Chand*, A 1957 SC 875.

19 *State of U.P.* v. *Raja Mohad. Saadat Ali Khan*, 1961 ALJ 79.

20 *Mohan Lal Chunilal* v. *Tribhovan Haribhai*, A 1963 SC 358; see also, *Indermall Lonia* v. *Subordinate Judge*, A 1958 AP 779; *Amritlal N. Shah* v. *Alla Annapurnamma*, A 1959 AP 9; *Har Prasad* v. *L.Sitaram*, 1958 All 36; *Jagannath Jha* v. *Ugrakant Chaudhry*, A 1981 Pat 200.

Chapter IX

AMENDMENT OF PLEADINGS ON DIRECTION BY COURT

Several Modes of Revision : When the pleading of a party is defective or incomplete, his opponent's remedy is to apply:

(1) For particulars, or further particulars;[1] *or*,

(2) For having the objectionable portion of the pleading struck out or amended;[2] *or*,

(3) If the pleading is a plaint and is so defective that it does not disclose any cause of action, for having the same rejected.[3]

Even when no such application is made by the opposite party, the court has also power to pass any of the three orders specified above *suo motu*, or to require the party to file a written statement, or additional written statement, in case the former pleading is incomplete.[4] It has also general power to have such amendments made as may be necessary for the purpose of determining the real questions in controversy between the parties.[5]

The amendment ordered by the court either *suo motu* or on application of the opposite party is what may be called *compulsory amendment*.

The party whose pleading is defective or incomplete may himself revise it :

(1) By filing further particulars with the leave of the court; *or*,

(2) By filing a written statement, if plaintiff, or an additional written statement, if a defendant, with similar leave of the court;[6] *or*,

(3) By amending it with the leave of the court.[7]

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1 O. 6, R. 5.
2 O. 6, R. 16.
3 O. 7, R. 11.
4 O. 8, R. 9.
5 O. 6, R. 17.
6 O. 8, R. 9.
7 O. 6, R. 17.

(This may be called *optional amendment* and will be dealt with in the next Chapter).

Further Particular : If a party does not state in his pleading full particulars of any material fact, as required by rules,[8] the court has power to call for further and better particulars.[9] The purpose of this rule obviously is :

(1) To do away with any ambiguity in the pleadings.

(2) To exclude all irrelevant matter.

(3) To pin down the parties to definite issues.

(4) To give each party a chance to know what claim of his adversary he has exactly to meet.

(5) To avoid multiplicity of suits.

It is the function of every court to get all the defects in the pleadings removed in order to ensure a fair trial without any prejudice to any party opposing each other in the suit. This might be done *suo motu* or on the application of the opposite party. Such applications are, at present, very rarely made in our country, but regard being had to the importance of particulars, they should be encouraged in all proper cases. An application should be made for particulars whenever a pleading is worded so vaguely that the opposite party cannot be sure what his opponent's line of attack or defence will be at the trial. Though such applications can be made at any time, yet, as a general rule, they should be made with reasonable promptitude and, if the applicant is a defendant, he should ordinarily make the application before putting in his defence, though he does not waive his right to call for particulars by merely putting in his defence. But if the plaintiff does not take objection that the defendant's pleading is not precise and takes no steps against it, he cannot make any grievance at the close of the case.[10] The court may either order particulars to be filed by the plaintiff before the defendant files his defence, or, if the court thinks fit, it may order the defence to be filed before calling upon the plaintiff to furnish particulars. Where thus the question is whether there are any nearer

8 *See* Chapters III & VI *ante* and O. 6, R. 4.

9 O. 6, R. 5.

10 *Sardar Dayal Singh* v. *Tulsidas*, A 1945 Bom 177.

reversioners of the deceased than a certain named person, the court may require the defendant, before the plaintiff produces his evidence, to state whom he claims to be such nearer reversioner.[11] Such an application cannot be made in an Appellate Court when the applicant did not do so in the trial court.[12] Where the relief claimed is ambiguous and vague a duty lies on the court to direct the plaintiff to furnish better particulars.[13]

Discovery and Particulars : Sometimes a party who is ordered to file particulars applies for discovery, and the question then arises whether he should be compelled to file particulars before discovery or discovery should be given before particulars are filed. The answer to this question depends on the circumstances of each case and the Judge must exercise a reasonable discretion in every case after carefully looking at all the facts. Where the party pleading is unable to give the particulars without first obtaining discovery from his opponent, discovery may be ordered before particulars or where it is necessary for him to inspect the opponent's account books, he may be allowed to do so.[14]

When a defendant knows the facts, and the plaintiff does not, the defendant should give discovery before the plaintiff delivers particulars.[15] For example, in a suit by a principal against his agent employed to purchase grain, the former alleged that the agent had paid higher prices and secretly received commission from the vendors. The agent insisted on particulars. The principal was held entitled to inspection of the agent's books before he could be called upon to give particulars as the plaintiff was not expected to have own knowledge of the facts necessary to enable him to give such particulars.[16] Likewise, where a commission agent was the plaintiff and the principal was the defendant who had acted on the account of the plaintiff, it was the plaintiff who was ordered to give discovery.[17] In a

11 *Kanhaylal* v. *Mt. Champa*, 153 IC 545, A 1935 All 203

12 *K.C. De* v. *Hira Bewa*, 167 IC 461, A 1937 Cal 51.

13 *Paramjit Singh* v. *Balwinder Kaur*, A 1985 P&H 255.

14 *Rama Krishniah* v. *Satyanandan*, 55 M 704, 62 MLJ 226, 1932 MWN 93, 137 IC 636.

15 *Per* Bowen, LJ in *Millar* v. *Haper*, (1888) 38 Ch D 110 at 112; *Edelston* v. *Russell*, (1888) 75 LT 927.

16 *Whyte* v. *Ahrens*, (1884) 26 Ch D 717; *Rama Krishniah* v. *Satyanandan*, A 1932 Mad 284.

17 *Rama Krishniah* v. *Satyanandan*, A 1932 Mad 284.

libel case, however, when the defendant pleaded justification for the charge of "imposter" and a "charity swindler" made by him against the plaintiff, the court ordered him to deliver particulars and held that he was not entitled to discovery and inspection of the plaintiff's account books before furnishing particulars, as "to apply the practice," namely, the practice mentioned above in respect of a suit by a principal against agent, "to the case of a libel would be to sanction the publication of a libel when the libellor knew no facts justifying the libellous statement, because he believed he could by process of discovery, elicit such facts."[18]

Particulars should not, however, be asked for in the following cases:

(1) Where it would be oppressive or unreasonable to make such an order, as, where the information is not in the possession of either party or could only be obtained with great difficulty.[19] In such cases, e.g. when the party sues or is sued in a representative capacity, an order may be made for the best particulars the party can give.

(2) Particulars can be given of an affirmative allegation and not of a mere denial. For example, where the plaintiff alleged that a committee did not act *bona fide*, fairly, or judiciously in declining to re-elect him as a member, and the committee denied these allegations, it was held that the plaintiff was not entitled to particulars of the facts or grounds upon which the committee based their decision.[20] So, in a suit for malicious prosecution when the plaintiff alleged want of reasonable and probable cause and the defendant *merely denied* the allegation, the defendant was not ordered to give particulars of his reasonable and probable cause.[21] If the defendant had *affirmatively* alleged a reasonable and probable cause for the prosecution, he could be ordered to give particulars.[22]

(3) Particulars cannot be asked of an allegation which is immaterial.

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18 *Zierenberg and Wife* v. *Labouchere*, (1893) 2QB 183.
19 Bullen and Leake's *Precedents of Pleadings*, 11th Ed., p. 58.
20 *Weinberger* v. *Inglis*, (1918) 1 Ch D 133.
21 *Roberts* v. *Owen*, (1890) 6 TLR 172.
22 *Mure* v. *Keye*, 4 Taunt 34.

(4) Particulars cannot be ordered of facts which are not material fact but which are merely evidence of material facts.

(5) When plaintiff sues for account to be taken of the money due to him, no particulars can be ordered from him.

Every party required to furnish further and better statement of nature of his claim or defence or to furnish further and better particulars has a right to file objections. If he succeeds in showing that it is a matter in which further statement or particulars should not be asked for on any one or more of the above grounds or that it would not be in the interest of the fair trial of the suit, or that the particulars could not be supplied without laborious inquiries or unnecessary expense, the court may, after hearing the parties, reject the prayer for further particulars or revise its own orders, if necessary, or pass such orders as may be considered appropriate.

But it is no objection to an application for particulars that the applicant must know the true facts better than his opponent, for he is entitled to know the outline of the case that his adversary will try to make out against him, which may be something different from the true facts. Nor is it a valid objection that if the order is made, it will indirectly compel the party giving the particulars to name his witnesses.

Terms on which Ordered : O. 6, R. 5, provides that a court is entitled to make the order for particulars "upon such terms, as to costs and otherwise, as may be just". Any reasonable terms can be imposed. An order may be made that if particulars are not delivered, the suit shall be dismissed,[23] or that the vague allegations will be struck out and the party making them shall not be allowed to give evidence in support thereof. Order to pay a certain sum as costs as a condition precedent of filing the further particulars may, and in fact in the majority of cases should, be made. If this order is disobeyed, the suit may be dismissed, if the plaintiff is in default, and the defence may be struck out, if the defendant is in default.[1] Where, however, the fact of which particulars are ordered is not the sole fact constituting the cause of action for the suit or constituting the

23 *Gajadhar* v. *Gokuldas*, A 1940 Nag 261, 190 IC 719.

1 *Gauri Shanker* v. *Manki Kunwar*, 21 ALJ 571, 45 A 624, 74 IC 466, A 1924 All 17 (DB).

defence, the whole suit need not be dismissed and the whole defence need not be struck out. In such cases it would be fair to order the striking out of the allegation of such fact from the pleading, and if, after striking it out, there still remain other facts on which the case can be tried, it should be tried. The Madras High Court has held that even if no conditions are initially imposed while ordering delivery of further particulars under O. 6, R. 5, the court may subsequently direct that the defence be struck out under O. 6, R. 16, for defendant's failure to comply with the order.[2]

Striking Out or Amending Opponent's Pleadings : Ordinarily the court is not to dictate to parties how they should frame their pleas.[3] But as pointed out by Bowen, L.J., this rule is "subject to this modification and limitation that the parties must not offend against the rules of pleading which have been laid down by the law, and if a party introduces a pleading which is unnecessary, and tends to prejudice, embarrass and delay the trial of the action, it then becomes a pleading which is beyond his right."[4] His opponent may, in such cases, apply that the pleading be struck out or amended, though sometimes it may be strategically expedient to leave it alone than to give opportunity to the opponent to reform or improve his pleading. If, however, the pleader thinks it is worthwhile to make such an application he should do so under O. 6, R. 16. Where thus a plaint is verbose, loose, and unintelligible, and does not give particulars, say, of the contract (breach of which is alleged) nor of the special damages claimed, nor any dates, the plaint ought to be struck off under O. 7, R. 11, or an order for its amendment should be made so that an intelligible case is presented and the defendant put in a position to know what case he has to meet.[5] Or to put it differently, so that he is not embarrassed in meeting it. Assertions which are not unnecessary, scandalous, frivolous or vexatious cannot be struck off under O. 6, R. 16.[6] Though an application under O. 6, R. 16, may be made "at any stage of the proceeding", yet it is

2 *The Nedungadi Bank* v. *Official Assignee*, A 1930 Mad 473.

3 *Bombay Corporation* v. *Pancham*, A 1965 SC 1008.

4 *Knowles* v. *Roberts*, (1888) 38 Ch D 263 at 270.

5 *Banerjee* v. *Manzar Ali*, 114 IC 906, 27 ALJ 496; *Randhir Singh* v. *Ravi Inder Singh*, A 1981 P & H 45.

6 *Roop Lal* v. *Nachhattar Singh*, A 1982 SC 559; *Naresh Kumar* v. *Prakash Narain*, A 1988 All 102; *Amar Nath* v. *Janardan Prasad*, A 1988 All 116.

strategically expedient to make it with reasonable promptitude, as the court has discretion to reject it if made at a very late stage.[7]

Any matter can, under this rule, be ordered to be struck out or amended which is "unnecessary or scandalous or which may tend to prejudice, embarrass or delay the fair trial of the suit or which is otherwise an abuse of process of the court. But the court will exercise this power with great care, caution and discrimination.[8] A written statement should not be struck out unless it is clear beyond doubt that allegations therein cannot afford a defence to the action and if not struck out, would unnecessarily delay the suit.[9] If the decision depends on the question of admissibility of evidence to prove facts involved in the objectionable plea, such latter question should not be determined in a proceeding on the application under O. 6, R. 16.[10]

An opportunity should be given to the party either to amend the pleading or furnish particulars or to have the concerned paras struck off.[11]

Scandalous Matters : "Scandal is calculated to do great and permanent injury to all persons whom it affects, by making the records of the court the means of perpetuating libellous and malignant slanders, and the court, in aid of the public morals, is bound to interfere to suppress such indecencies which may strain the reputation and wound the feelings of the parties and their relations and friends."[12] The court has inherent power to expunge unnecessary and scandalous remarks from any petition or affidavit.[13] An allegation containing imputations against the opponent or charging him with bad faith or misconduct is of a scandalous nature, and so is a statement containing indecent or offensive matter. Imputations of partiality even against a trial judge may be expunged as scandalous by an appellate court from a memorandum of appeal.[14] It will be struck out by

7 *New Fleming Spinning and Weaving Co.* v. *Kessowji*, 9 B 373; *Saraswathi* v. *S.S. Somasundaram Chettiar*, (1970) 2 MLJ 119.

8 *Tennet* v. *Michael*, 29 CWN 670; *A.I.R.* v. *Dater*, A 1951 Nag 412.

9 *Anant Balkrishna Naik* v. *Govind Datta Gaindalkar*, A 1976 Goa 74.

10 *Anderson* v. *Walter Mitchel*, 88 IC 434, 29 CWN 670, A 1925 Cal 860 DB.

11 *Ram Raj Tewari* v. *Vijaiya Laxmi*, A 1986 All 325.

12 *Story's Equity Pleadings*, 10th Ed. Section 270.

13 *J.B. Patnaik* v. *Bennet Coleman & Co.Ltd.*, A 1990 Orissa 107; *Amalgamated Commercial Properties (P) Ltd.* v. *Hariprasad*, 1965 (2) MLJ 477.

14 *Zamindar* v. *Bennayya*, 22 M 155.

the court itself if the party declines to do so,[15] and it is not for the court to amend it so as to make the allegations less scandalous. For instance, where a party alleged that the suit had been brought at the instance of plaintiff's son who was an *awara*, and the court simply allowed the word to be changed into *awara gard*, it was held that the word should have been entirely struck out.[16] The words *'awara', 'chalaak'* and *'qamarbaz'* were held scandalous and irrelevant when used in written statement and were ordered to be expunged.[17] But, however grave the imputation may be, it will not be struck out if it is relevant to any issue in the case e.g., in an heir's suit to set aside a will on the ground of undue influence of the legatee on the testator, the allegation that she (*i.e.*, the legatee) had immoral connection with the testator at the time, though scandalous, will not be struck out, because it is relevant. For nothing can be scandalous which is relevant. A mere general charge of immorality against Hindu father while challenging an alienation made by him or a debt incurred by him cannot, however, be permitted to stand, not because it is scandalous but because of vagueness, obscurity and want of particulars.[18]

An application to strike out scandalous matters can be made not only by a party to action, but even by a third person who is affected by the scandalous matter with the leave of the court.[19]

Unnecessary Matter: To determine whether an allegation is necessary for the formulation of the plaintiff's case or defendant's defence or relevant for the purpose of the decision of any issue. The test for this would be whether the allegation could form part of the evidence which the party making it would be bound to lead for the purpose of obtaining the relief asked for by him.[20] Where an allegation in the written statement cannot offer a defence to the action, and would unnecessarily delay the suit it must be struck off.[1] Unnecessary matter, even if not scandalous,

15 *Sheonarain Jafa* v. *Sri Gupta*, 1961 ALJ 52.

16 *Sumat Prasad* v. *Ram Sarup*, A 1946 All 204.

17 *Jagannath Prasad* v. *Ramchandra*, A 1952 All 408.

18 *Jagdish Narain* v. *Hazari Lal*, A 1932 All 467.

19 *Crackwell* v. *Janson*, 11 Ch. Div. I; *Jagannath* v. *Ram*, A 1952 A 408 (DB).

20 *P.W. Shamdasni* v. *Central Bank*, A 1944 Bom 198; *Triveni Lal Srivastav* v. *Banaram Kriplani*, 1970 MPLJ Note 25; *K. Saraswathi* v. *P.S.S. Somasundaram Chetiar*, (1970) 2 MLJ 119.

1 *Singhai* v *Kesridhal Mill*, A 1976 MP 54.

need not be ignored as harmlessly superfluous, as it also tends to obstruct the fair trial of the suit. For as seen in earlier Chapters, prolix, verbose and irrelevant pleadings may cloud the real issues and cause difficulty to the opponent in understanding what case he has to meet and deciding what evidence to lead or rebut and what not.

Embarrassing Matter: In considering the question whether a matter tends to "prejudice, embarrass, or delay the fair trial of the suit", liberal interpretation should be given to the words "trial of the suit",and any matter which embarrasses a party not exactly at the trial but at any stage of the proceeding, e.g., in drawing up his defence, would be equally embarrassing. A pleading is embarrassing if it is ambiguous or unintelligible, such as a plea of justification in a libel suit leaving it doubtful how much of the libel the defendant intends to justify, or if it is so vague, or so general as not clearly to indicate what case the opposite party has to meet at the trial, or when full particulars are not given which are necessary. But pleading is not necessarily embarrassing merely because it is prolix, or because it contains allegations which are inconsistent or stated in the alternative. In a suit for possession, the defendant denied the genuineness of a deed of *waqf* and, in the alternative, pleaded that the deed had been obtained from her by fraud and undue influence, it was held, that there was nothing to embarrass, delay or prejudice the fair trial.[2] A plaint in which there is an improper *misjoinder* of causes of action, e.g. in contravention of O. 2., R. 5, or of causes of action and parties, may be embarrassing.

The allegations in a plaint which are not only unnecessary but also tend to prejudice and embarrass the defendants in the fair trial of the suit; have to be struck out.[3] An embarrassing plea is liable to be struck off. The question whether a plea is embarrassing is a question of fact in view of the facts and circumstances of the case. A claim or defence which a party is not entitled to make use of or a pleading which contains irrelevant allegations is embarrassing.

Where a plea affronts a legal provision; it is liable to be struck off.[4] It was held therein that in a suit for recovery of the loan on the basis of a

2 *Farid-un-nissa* v. *Mukhtar*, 40 IC 448, 4 PLJ 230.

3 *Paramnath* v. *Rajiv Gandhi Foundation*, A 1999 Delhi 40.

4 *Arjees Wool and Fur Industries* v. *Allahabad Bank*, A 1992 All 111.

mortgage by deposit of title deeds, a plea for foreclosure is an affront to sections 67 and 96 of the Transfer of Property Act and is liable to be struck off.

The court may order (a) partial amendment of the pleading by striking out the objectionable portion if the objectionable part be severable, or (b) strike out the whole pleading, if either the objectionable part is not severable or the entire pleading suffers from the objectionable features mentioned above or (c) give leave to amend.[5]

The trial court is expected to afford an opportunity to the plaintiff of striking out so much part of the plaint including the relief clause attracting the applicability of O.6 R.16 and in the event of the plaintiff failing to comply with the order of the court, the court should not hesitate to exercise its power to strike out so much of the plaint averments as would, in its opinion, amount to unnecessary, scandalous, frivolous or vexatious or tend to delay the trial or amount to the abuse of the process of the court.[6] The Supreme Court has held that the court striking off certain paragraphs as unnecessary, frivolous or vexatious or likely to prejudice, embarrass or delay the trial has to record a finding as otherwise the direction will not be proper.[7]

Application for Rejection of Plaint: If a plaint does not disclose a cause of action, e.g., if it omits allegation of a material fact which is essential to give the plaintiff the relief which he seeks, it is not necessary for the defendant to file a defence on the merits but he may make an application that the plaint should be rejected under O. 7, R. 11. For instance, in a suit by an anomalous mortgagee for realisation of the mortgage money by sale of the mortgaged property, if the plaint does not show that a power to realise the mortgage money by sale was specifically given to the plaintiff under the mortgage deed, it does not disclose a cause of action and can be rejected. The court may pass an order of rejection at any stage of suit when the defect is brought to its notice, even after the plaint has been registered.[8] Distinction, however, must be drawn between a case where

5 O. 6, R. 17, *see next* Chapter.

6 *Meera Asthana* v. *Rajendranath Asthana*, A 1994 MP 18.

7 *Roop Lal Sathi* v. *Nachhattar Singh*, A 1982 SC 1559.

8 *Kishor* v. *Sabdal*, 12 A 553; *Venkatesha* v. *Ramaswami*, 18 M 338; *Pudmanand* v. *Anant Lal*, 34 C 20; *Kiranchandra*, v. *Puranchandra*, 40 CWN 1590; *Sakthi*

the plaint itself does not disclose a cause of action and one in which after considering the entire material on record, the court may come to the conclusion that no cause of action is disclosed. In the latter case plaint cannot be rejected.[9] If on a meaningful, not formal, reading of the plaint it is manifestly vexatious or meritless, in the sense of not disclosing a clear right to sue, the court should reject the plaint under O. 7 R.11.[10] But a plaint must be rejected as a whole; it cannot be rejected in respect of a part of the claim.[11]

The court can, of course, instead of rejecting the plaint, permit the plaintiff to amend the plaint if a cause of action does really exist but has not been sufficiently disclosed, or can pass any other equitable order.[12]

Like Power in Election Petitions : In respect of election petitions also it is necessary for the petitioner to set out full particulars of any corrupt practice, vide section 83 (1) (c) of the Representation of the Peoples Act, 1951 (in the case of elections to Parliament or State Legislatures) or corresponding provision of the relevant statute (in the case of elections to other bodies). The general averments deficient in requisite pleadings of all the constituent parts of the corrupt practice did not constitute a pleading of full cause of action and, therefore, had to be ignored and struck out in accordance with O.6, R.16.[13]

In respect of undue influence, thus, it should be stated, for instance, who attempted to induce voters to believe that voting for a particular person would render them objects of divine displeasure or spiritual censure and in what manner such attempts were made.[14] Thus better particulars

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Sugars Ltd v. *Union of India*, A 1981 Del 212; contra *Valiya* v. *Suppanar*, 2 M 308; *Umesh Chandra Saxena* v. *Administrator General, Allahabad*, A 1999 All 109, 125.

9 *State of M.P.* v. *Gangacharan*, 1974 MPLJ 533.

10 *Arivanandam* v. *Sathyapal*, A 1977 SC 2421; *Ratanlal* v. *Kanthiyalal*, 1998 AIHC 3586 (Raj); *Sanjay Kaushish* v. *D.C. Kaushish*, A 1992 Delhi 118.

11 *Maqsud Ahmad* v. *Mathra Datt & Co.*, A 1936 Lah 1021; *Balwant Singh* v. *State Bank of India*, A 1976 P & H 316; *Venkata* v. *Secretary of State*, A 1931 Mad 175; *Apparao* v. *Secretary of State*, A 1935 Mad 389; *Maqsood* v. *Mathra & Co.*, A 1936 Lah 1021.

12 *Mahomed Fateh Nasib* v. *Saradindu*, 162 IC 689, A 1936 Cal 221.

13 *Manohar Singh* v. *Patil*, A 1996 SC 796.

14 *Lakhi Prasad* v. *Nathmal*, A 1969 SC 583, (1969) 2 SCR 41.

may be called for and in case of non-compliance the court can order striking out of the vague charges.[15] But the petitioner cannot be allowed to add new grounds or new charges by amending his petition, if a fresh petition on those allegations would on the date of the proposed amendment be barred.[16] This applies also to addition of a necessary party or to curing any other defect on account of which the petition is required to be dismissed.[17] To this extent the powers of the court in regard to permitting amendment of an election petition are narrower than the powers of a court to permit amendment of pleading in a civil suit, one important reason being that a petitioner in an election case cannot claim the same latitude on notions of equity or justice as a plaintiff in a civil suit, for in an election petition the entire electorate is involved and the fight is not in respect of civil rights of two private parties; the courts are, therefore, loath to interfere lightly with the collective verdict of the constituency.[18] Another reason for greater strictness in election disputes is that allegations of corrupt practices are quasi-criminal in nature, and proof of a single corrupt practice may be fatal to an election; hence specific plea and strict proof are enjoined. Hence it is only if the material facts are already stated then more and better particulars can be given later, but if the material facts themselves are wanting in the original petition, they cannot be allowed to be supplied through amendment, as that would amount to making a fresh petition.[19] If no material facts are pleaded at all, or if the allegations of charges are incomplete, then such allegations are liable to be struck off under O. 6, R. 16,[20] and if the petition is based solely on such allegations as do not make out any statutory ground at all then the petition can be dismissed under O. 7, R. 11 for failure to disclose a cause of action.[21]

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15 *Bhikaji Keshav* v. *Brijlal*, A 1955 SC 610 (para 8).

16 *Ram Dayal* v. *Brij Raj Singh*, A 1970 SC 110, (1969) 2 SCC 218.

17 *Mohan Raj* v. *Surendra Kumar*, A 1969 SC 677, (1969) 1 SCR 630.

18 *Rahim Khan* v. *Khurshid Ahmad*, A 1975 SC 290.

19 *Samant N. Balkrishna* v. *George Fernandes*, A 1969 SC 1201, (1969) 3 SCC 238; *Vatal Nagaraj* v. *R.D. Sagar*, A 1975 SC 349, (1975) 4 SCC 127.

20 *Dhartipakar* v. *Rajiv Gandhi*, A 1987 SC 1577.

21 *Udhav Singh* v. *Madhav Rao Scindia*, A 1976 SC 744; *Charan Lal Shau* v. *Giani Zail Singh*, (1984) 1 SCC 390, A 1984 SC 309.

Chapter X

VOLUNTARY AMENDMENT OF PLEADINGS

(1) By Filing Further Particulars: When a party, who has in the original pleadings, or in compliance with an order of the court, given all particulars then within his knowledge, subsequently discovers some new matter which he desires to add to the particulars already given, he should obtain leave to deliver further particulars. For, without such leave, he has no right to deliver further particulars, and unless he delivers such particulars, he will not be entitled to give evidence of the new facts and his evidence shall be confined to the particulars already given. Such an application will generally be allowed where the addition of particulars will cause no injury to the opposite party, except such as can be compensated by costs, but it shall not be allowed if it is sought thereby to introduce a new cause of action, e.g. raise a charge of fraud for the first time, or to increase the amount claimed after the defendant has paid into court the full amount originally claimed. Such application, if made at the time of trial is, as a rule, refused.

(2) By Filing Additional Pleading: A party may file an additional pleading in the shape of a written statement,[1] if plaintiff, or an additional written statement, if defendant, when the original pleading is incomplete. But this, too, can be done only with the leave of the court, and not otherwise.[2] A minor, on attaining majority during the pendency of the suit, can, with the leave of the court, file another written statement or amend the written statement filed by his guardian *ad litem* previously.[3] If a defendant makes certain new allegations in the written statement and the plaintiff wants to reply to them, he has to obtain leave to file a written reply, except that when he wishes to plead to the defendant's claim for a set off, he can do so as of right and no leave of the court is necessary.[4] Similarly if the

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1 The expression 'written statement' used here comprises a replication, *vide* O. 8, R. 9.

2 *Malkiat* v. *Om Prakash*, A 1995 Raj 38; *Cawnhon Dunkenley & Co. Ltd.* v. *Steel Authority of India*, A 1993 Ori 141; *Saiyad Serajul Hasan* v. *Syed Murtaza Ali Khan Bahadur*, A 1992 Delhi 162.

3 *Ramkhelawan Singh* v. *Ganga Prasad*, A 1937 Pat 625, 172 IC 513; *Shiva Kumar Singh* v. *Kari Singh*, A 1962 Pat 159.

4 O. 8 R. 9.

defendant has, by mistake, omitted to state any important fact in his written statement, he can obtain leave to file an additional written statement, but no additional statement can be filed after the plaintiff's case has been closed,[5] or after the parties have entered upon their cases at the hearing,[6] or so as entirely to change the defence set up in the original written statement.[7]

Departure : No subsequent pleading should raise any new ground of claim or defence or contain any allegation of fact inconsistent with the previous pleading.[8] In other words, what is technically known as a "departure" in pleading is not allowed. When a plaintiff claimed a decree as owner alleging that the decree-holder was her *benamidar*, her allegation in the replication that she had a charge on the decree was ignored and was not put in issue.[9]

In O. 6, R. 7, it is laid down that no pleading shall raise any new "ground of claim", but the word "claim" seems to have been used in a much wider sense here so as to include the claim of the defendant also, though it would have been better to have said "new ground of claim or defence". Therefore, this rule prohibits the raising of a new plea in defence as well as a new ground of claim, as there is no justification for making any distinction between the pleading of a plaintiff and that of a defendant in this respect.

If a party intends to set up a new ground of claim or a new plea or to allege a fact inconsistent with his previous pleading, his proper course is to apply for leave to amend his original pleading [10] and not to apply for leave to deliver an additional pleading nor can he set up new grounds in the guise of further particulars [11] or in a rejoinder. [12]

(3) By Amendment : The third and the most important way in which a plaintiff or defendant can revise his pleading is by amending it. This is

5 *Venkataswami* v. *Uppilpalayam*, 153 IC 453, A 1935 Mad 117.
6 *Haji Saboo* v. *Ayeshabai*, 30 IA 127.
7 *Douglas* v. *Collector of Benares*, 5 MIA 271 (290).
8 O. 6, R. 7.
9 *Govind Singh* v. *Mungaji*, 57 IC 684 Nag.
10 *Hardial Singh* v. *Sardarni Jaswant Kaur*, A 1943 Lah 159.
11 *Mehnga Das* v. *Maya Singh*, A 1937 Lah 795.
12 *Vishwapati* v. *Venkat Krishna*, A 1963 AP 9.

sometimes necessitated by fresh information, may be (i) by replies to interrogatories served on the opponent, (ii) by discovery and inspection, (iii) discovery of documents whose existence could not be previously known by exercise of due diligence, and (iv) by the own pleas of his adversary. All or any one of these factors may require re-shaping of the claim or defence with the resultant prayer for voluntary amendment.

Statutory Provision : The provision of the Code of Civil Procedure on the subject of voluntary amendment is contained in O. 6, R.17, and has been borrowed, word for word, from the rule on the subject followed in the English Courts. It is in the following terms :

"The court may, at any stage of the proceeding, allow either party to alter or amend his pleading in such manner, and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

The power to allow an amendment is undoubtedly wide and may at any stage be appropriately exercised in the interest of justice, the law of limitation notwithstanding. But the exercise of such a far-reaching discretionary power is governed by judicial considerations and wider the discretion, greater are to be the care and circumspection on the part of the court.[13] It must, however, be remembered that amendment can, in no case, be claimed as a matter of right but it is absolutely in the court's discretion,[14] which of course, is a judicial discretion and cannot be exercised arbitrarily.[15] *Bona fide* inadvertent omission to raise alternative plea can in exceptional circumstances be rectified by inclusion of such plea even if a fresh suit on the amended plaint may have become barred by time,[16] though normally the court would be loath to allow such a belated

13 *Ganga Bai* v. *Vijaykumar*, A 1974 SC 1126.

14 In re *Joti Mahalinga*, 12 IC 104, 10 MLT 881; *Mukandi* v. *Jogesh*, 20 CWN 1276, 35 IC 370, 1 Pat LJ 393; *Ghulam Haider* v. *Sardar Ali*, 73 IC 748; *Kastur Chand* v. *Maung Botha*, 11 IC 858, 4 Bur LT 188.

15 *Tapi Ram* v. *Sadu*, 21 B 570; *Satyes* v. *Monmohni*, 25 IC 567, 19 CLJ 518; *Kanda* v. *Waghu*, A 1950 PC 68 (amendment which altered the real matter in controversy could not be allowed).

16 *A.K. Gupta* v. *Damodar Valley Corporation*, A 1967 SC 96; *Ganga Prasad Sarraf* v. *Smt. Sakra*, A 1977 All 210.

amendment.[17] It is open to correction, if necessary, by a court of appeal or revision in case it is exercised arbitrarily or perversely.[18] It is the duty of the court (Appellate Court) to correct erroneous interlocutory orders, though not appealed against as such, at the time of the hearing of appeal against the order deciding the case.[19] But, ordinarily, an Appellate Court will not interfere with this discretion of the lower court, unless it is satisfied that the lower court has come to an absolutely wrong conclusion[20] or unless its exercise of power is shown to be wrong or perverse,[1] or based on a wrong principle.[2] The order of the lower court will not be set aside, even if erroneous, when it has not caused prejudice to the other party,[3] and a court of revision will not interfere unless the lower court has acted with such material irregularity as to justify interference.[4]

There is no specific provision in the Code providing for amendment of petitions and other applications moved under the Code, but even in the absence of any provision, the court may allow the amendment of the petitions and other applications in the exercise of powers under Sec. 151 CPC for the ends of justice or to prevent the abuse of the process of the court.[5] The power to grant amendment is not fettered by any narrow or technical limitation.[6] The High Court of Madras has however held that resort cannot be had to section 151, if a case is not covered by the specific provisions of O.6, R.17.[7]

17 *Laxman* v. *Nanabhoi*, A 1964 SC 11; *Charan Das* v. *Amir Khan*, A 1921 PC 50, 57 IC 606.

18 *Sheo Narain* v. *Ram Prasad*, 74 IC 317, A 1923 Nag 241.

19 *Seth Nanak Chand Shadiram* v. *Amin Chand Pyarélal*, A 1970 Cal 8; see also, *Satyadhyan Ghosal* v. *Deorajin Debi*, A 1960 SC 941.

20 *Raja Ram* v. *Salig Ram*, 11 IC 481, 14 CLJ 188; *Imdad Ali* v. *Sayed Ali*, 40 IC 65, 26 PR 1917.

1 *Hari Krishna* v. *Dinar*, 29 IC 535 Cal; *Syed Md. Mohsin Rizvi* v. *State of U.P.*, A 1979 All 234.

2 *Badri Prasad* v. *Jagannath*, 101 IC 569 Oudh.

3 *Inder Narayan* v. *Nanak Chand*, 51 PLR 1911, 9 IC 267.

4 *F.A Gregory* v. *Albert Pusach*, 49 IC 441, 21 PWR 1912; *Ratlam Electricity Supply Co.* v. *M.P. Electricity Board*, 1980 (Supp) SCC 598; *Kisan Co-operative Sugar Factory* v. *Rejendra Paper Mills*, 1984 UPLBEC 597.

5 *Kedar Prasad* v. *Raghunath Prasad*, A 1992 Pat 95.

6 *Sanatan Jena* v. *Babji Sahu*, A 1990 Orissa 186; *Kedar Prasad* supra.

7 *Meenakshisundaram* v. *Venkatachalam*, A 1980 Mad 105 (DB).

An amendment cannot be claimed as of right but is discretionary with the courts.[8] For this reason, no hard and fast rule to guide the courts can be laid down. It would be granted or refused according to the circumstances of each case and with due regard to the interest of the other side.[9] The facts differ from case to case and unless the facts are similar an earlier authority may not apply to a subsequent case.[10]

Normally, the court should be liberal in granting amendment unless, of course, the court is of the opinion that such amendment would cause serious injustice and irreparable loss to the other side. The provisions of O. 6 R. 17 are intended to do justice and not to shut out justice merely on technicality of pleadings.[11]

General Principles of grant of leave to amend : The correct principles which should govern the grant or refusal of prayer for amendment of pleading were, as observed by the Supreme Court,[12] enunciated by Batchelor, J. in *Kishandas Rupchand* v. *Raichappa Vithoba*,[13] in these words :

"All amendments ought to be allowed which satisfy the two conditions (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties...but I refrain from citing further authorities as in my opinion they all lay down precisely the same doctrine. That doctrine, as I understand it, is that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs."

The aim of every court is to see that multiplicity of suits is avoided, and that the real matters in controversy between the parties are clearly brought out, and all amendments necessary for these purposes should be allowed provided the other party is not seriously prejudiced and the

8 *Santi* v. *Mulkraj*, 39 PLR 769, A 1937 Lah 894, 175 IC 624, 11 RL 28.

9 *Gurdas* v. *Bhag*, 11 IC 231 Punj; *Venkatasubbiah* v. *Seshachalam*, 12 IC 173, 22 MLJ 136, 60 MLT 549, 2 MWN 257.

10 *Noor Khatoon* v. *Samana*, 31 IC 7, 9 SLR 61.

11 *Yumnam Ibobi Singh* v. *Yumnam Yaima Singh*, A 1993 Gau 42; *Ganesh Trading Co.* v *Moji Ram*, A 1978 SC 484.

12 *P.H. Patil* v. *K.S. Patil*, A 1957 SC 363.

13 ILR 33 Bom 644.

character of the suit is not altered, and also, provided the object of the amendment is not to abuse the powers of the court and to work a clear injustice.[14]

The general principles on which the discretion vested in courts is to be exercised are: (1) the court should not allow a party to raise a new case; (2) it should strive to allow amendments in all cases where the opposite-party can be compensated in costs; (3) it should allow amendment where due to supervening factors, new circumstances have come into existence, or the changed circumstances may make the relief claimed inappropriate and so proper relief by way of amendment may be claimed;[15] (4) The court should not permit an amendment by which a legal right acquired by the opposite party is taken away.[16] This proposition is, however, qualified by the provisions of section 21, Limitation Act 1963 (old section 22) in so far as addition of a new defendant is concerned.[17]

Mere failure to set out even an essential fact does not by itself constitute a new cause of action. A different or additional approach to the same facts would be allowed by amendment even after the expiry of the statutory period of limitation.[18] An amendment questioning the plaintiff's right to sue or to continue the suit should not be refused,[19] as also any amendment affecting the jurisdiction of trial court.[20] The court can take into consideration subsequent events and grant relief in order to attain the ends of justice and shorten litigation.[1]

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14 *Nichhal Bhai Vallab Bhai* v. *Jaswant Lal Zinabhai*, A 1966 SC 997.

15 *Rajeshwar Dayal* v. *Padam Kumar Kothari*, A 1970 Raj 77.

16 *Mary Niemeyer* v. *Ebrahim*, A 1937 Rang 313; *The Bihar Co-operative Motor Vehicle Insurance Society Ltd.* v. *Rameshwar Rai*, A 1970 Pat 172; *Modi Spinning and Weaving Mills Co. Ltd.* v. *Ladha Ram*, A 1977 SC 680; *Bhagwanji Morarji Gokuldas* v. *Alembic Chemial Works*, A 1948 PC 100.

17 On this subject, *see* chapter XII, *post*.

18 *Charan Das* v. *Amir Khan*, A 1921 PC 50, 57 IC 606; *Ganesh Trading Co.* v. *MojiRam*, A 1978 SC 484; *A.K. Gupta & Sons* v. *Damodar Valley Corporation*, A 1967 SC 96; *Jai Jai Ram Manohar Lal* v. *National Building Material Supply*, A 1959 SC 1267.

19 *South India Corporation (Agencies) Pvt. Ltd.* v. *State Trading Corporation of India*, A 1970 Ker 138.

20 *M. Allauddin* v. *P.S. Lakshmi-Narayan*, A 1970 Mad 247; see also *Abdul Kari* v. *Shursha Mudaliar*, ILR (1968) 2 Mad 57.

1 *H.K. Adhyaru* v. *Chunni Lal*, A 1956 SC 655; see also, Chapter VIII, *ante* under the heading "Subsequent Events".

Amendments should be allowed in suitable cases in order to overcome the effect of *bona fide* mistakes, whether of law or of fact,[2] to avoid multiplicity of suits.[3] and an amendment which does not change the subject matter of the suit and is not otherwise unfair can be allowed even in appeal.[4] It does not matter that the original omission arose from negligence or carelessness.[5] "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs",[6] for, as observed by Bowen, L.J.,[7] and accepted in numerous Indian decisions, "there is one panacea which heals every sore in litigation, and that is costs", that there is "no kind of error or mistake which, if not fraudulent or intended to over-reach, the court ought not to correct if it can be done without injustice to the other party" and that "courts do not exist for the sake of discipline but for the sake of deciding matters in controversy." The object of the courts, according to the eminent judge, is "to decide the rights of the parties and not to punish them for their mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights".

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2 *K.E.A.K.A. Sahib* v. *K.N. Adamsa*, 81 IC 465, A 1924 Rang 249; *Firm Bidhi Chand* v. *Basdev Pd.*, 1968 ALJ 235; *Jai Jai Ram* v. *National Building Material Supply*, (1969) 1 SCC 869 (Not obligatory to mention in application that error, omission or mis-description was caused by *bona fide* mistake); *Barnik Ray* v. *W.B. Housing Board*, A 1985 Cal 362; *Ram Avtar* v. *Jagdish*, A 1985 Pat 1; *Mohd. Shamim* v. *Delhi Waqf Board*, A 1985 Del 464 (amendment to withdraw wrong admission on law).

3 *Sardar Hari Bachan Singh* v. *Major Har Bhajan Singh*, A 1975 Punj 205; *Nichhalbhai Vallabhai* v. *Jaswantilal*, A 1966 SC 997.

4 *Ram Dhan* v. *Lachmi Narain*, 16 IC 648, A 1937 PC 42, 1937 AWR 184 (PC).

5 *Gulabrao* v. *Manjoolbai*, A 1928 Nag 203, 109 IC 293; *Mahomed Husein* v. *Ko Maung*, 117 IC 563, A 1929 Rang 33.

6 *Clarapede* v. *Commercial Union Association*, (1883) 32 WR 262; *Weldon* v. *Neal*, (1887) 19 QBD 394; *Manjidutta* v. *Klannad*, 16 IC 785 Cal; *Lummna Summana Malick* v. *Dharam Rao Chougule*, A 1971 Mys 284; *Sardar Hari Bachan Singh* v. *Major Har Bhajan Singh*, A 1975 Punj 205.

7 *Cropper* v. *Smith*, (1884) 26 Ch D 700, 711; *Ram Gopal* v. *Mam Chand*, A 1981 All 352; *Amiya Kumar* v. *Paichha*, (1984) 58 Cutt LT 507.

All amendments which do not throw any unnecessary or unreasonable burden on the other side should be allowed and only those which cannot be compensated by award of costs should be refused.[8] Grant of amendment should, therefore, be the rule, and refusal the exception. The amendment ought to be allowed which satisfy the two conditions, (a) of not working injustice to the other side, and (b) of being necessary for the purposes of determining the real questions in controversy between the parties.[9] Rules and procedures are intended to be the handmaid to the administration of justice and a party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of pleading of a party unless it is satisfied that the party applying was acting *mala fide* or that by his blunder he had caused injury to his opponent which may not be compensated for by an order for costs. However negligent or careless may have been the first omission and however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side.[10] In such cases the opponent should also be allowed to file additional pleading to meet the amended case.[11]

But the word "however late the proposed amendment" must not be understood to mean that a counsel may unnecessarily delay an amendment. Indeed it is of the first importance that an amendment should be applied for immediately the pleader comes to the conclusion that an amendment is necessary. An amendment, though late, may be allowed, but the applicant must show why the application is made so late and must satisfy the court that the delay is not deliberate and the amendment has been prayed for

8 *Kovduru* v. *Jagani*, A 1946 Mad 324; *Pirgonda Hongonda Patil* v. *Kalgonda Shidgonda Patil*, A 1957 SC 363.

9 *P.H. Patil* v. *K.S. Patil*, A 1957 SC 363.

10 *Jai Jai Ram Manohar* v. *National Building Material Supply Co.*, (1969) 1 SCC 869, A 1969 SC 1267; *Suraj Prakash* v. *Raj Rani*, (1981) 3 SCC 552 (amendment subject to heavy costs upheld); *Ganesh Trading Co.* v. *Moji Ram*, A 1978 SC 484; (1978) 2 SCC 91; *Har Charan* v. *State of Haryana*, (1982) 3 SCC 408, *Gulabrao* v. *Mt. Manjoolabi*, 109 IC 293, A 1928 Nag 203; compare, *Saradudu* v. *Jaharlal*, 46 CWN 33, 74 CLJ 61, A 1942 Cal 153; *Shanabhai Mangalbhai Patel* v. *Bhagavanbhai*, A 1990 Guj. 74.

11 *Tharayil Sarda* v. *Govindem*, (1983) 2 SCC 276; *Mulk Raj* v. *District Judge*, (1982) 3 SCC 237.

with reasonable promptitude. Application before the beginning of trial cannot be said to be belated.[12] An amendment though belated but if the claim is not barred by limitation would normally be allowed.[13]

Late applications for amendment are liable to be rejected, if *there has been unexplained delay in making the application.*[14] An amendment should not normally be allowed after the conclusion of the trial and arguments.[15] An amendment including a prayer for consequential relief in a declaratory suit should have been allowed by the High Court in first appeal even after the expiry of period of limitation for fresh suit for that relief as it did not raise a new case but only a different or additional approach to the pleaded facts and was necessary for a decision of the real dispute between the parties.[16] An amendment seeking alternative relief, under O.6, R. 17, is permissible.[17] If the rest of the plaint is not sought to be amended and only a relief inadvertently omitted is sought to be added such amendment is liberally allowed.[18] Where the defendant in written statement specifically admitted that he had entered into an agreement for sale of the suit land with the plaintiff, an amendment seeking to modify the averments in written statement that the defendant entered into agreement with the plaintiff, for development of the suit land for mutual benefit of the parties was allowed.[19]

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12 *Dharmalinga* v. *A.M. Krishnaswami*, A 1949 Mad 467, (1948) 2 MLJ 644, 1949 MWN 71.

13 *Ganpat Singh* v. *Sher Bahadur Singh*, A 1978 All 66; followed in, *Ramdes* v. *Ram Bahadur*, A 1984 All 206; *Jawarmal Ramkaran*, v. *P.K. Jamnadas*, A 1990 Guj 42.

14 *Ganga Bai* v. *Vijay Kumar*, (1974) 2 SCC 393, 1974 SCD 682, A 1974 SC 1126; *Raj Kumar Mohan Singh* v. *Raj Kumar Pashupati Nath*, (1969) 2 SCC 258, (1970) 2 SCR 428, A 1970 SC 42.

15 *Shanmugha Rajeswara* v. *Chidambaram Chettiar*, 1938 MWN 471, 173 IC 772, A 1938 PC 123, 1938 ALJ 292 (PC); *Gobi Pillai* v. *Dr. Swamy*, (1980) 1 MLJ 387.

16 *A.K. Gupta & Sons* v. *Damodar Valley Corporation*, A 1967 SC 96; see also *Rukhma Bai* v. *Laxminarayan*, 1960 ALJ 45 SC; *Mahabir Pd. Singh* v. *Narmadeshwar Pd. Singh*, A 1967 Pat 326; *Suraj Prakesh Bhasin* v. *Raj Rani Bhasin*, A 1982 SC 485; *Tika* v. *Hiralal*, 195 IC 428, A 1941 Pat 276.

17 *G. Nagamma* v. *Siromanamma*, (1996), 2 SCC 25.

18 *Satyabhama* v. *Sailabala*, A 1984 Ori 181.

19 *Askhaya Restaurant* v. *P. Anjanappa*, A 1995 SC 1498.

An amendment applied for after three years to wriggle out of certain admissions made earlier in the plaint and to introduce an entirely new cause of action was thus disallowed.[20] A belated amendment to treat a suit for dissolution of partnership and accounts as one for remuneration as an agent of the partnership was rejected.[1] Where a plea of non-joinder had been raised in the written statement, the prayer of the plaintiff seeking to remove the defect at the Supreme Court stage was rejected.[2] In another case the Supreme Court rejected the request for amendment of pleading for introducing a family custom with regard to succession to a *non-taluqdari* estate mainly on the ground of delay. This contention was refused to be raised as it would give a "fresh lease of life".[3] An amendment sought at the stage of arguments taking away an admission in pleadings was disallowed.[4]

A legal representative of a deceased plaintiff is not entitled to ask for an amendment which the deceased could not have asked for. The holder of an impartible estate in Madras sued for a declaration that a promissory note and a lease obtained from him by the defendant were void as they had been obtained by fraud and undue influence. After his death his legal representative who was brought on record applied for amendment of the plaint by raising the contention that the transactions are not binding on the estate as the deceased had only a life estate and was not competent to alienate it beyond his life time. It was held that as the deceased could not have himself challenged his own alienation and claimed this relief, the amendment could not be allowed.[5] An amendment should not be allowed where the amendment is neither necessary for determining the real controversy in suit, nor bonafide,[6] where valuable right has accrued in favour of the opposite party,[7] at appellate stage where it will cause

20 *Modi Spinning & Weaving Mills* v. *M. Ladha Ram & Co.*, A 1977 SC 680; see also, *Ram Dev* v. *Ram*, A 1984 All 206; *Ganpat Singh* v. *Sher Bahadur*, A 1978 All 66.

1 *Brij Mohan* v. *Vallharia*, A 1965 Raj 172.

2 *Kanak Rathammal* v. *Lognath*, A 1965 SC 271.

3 *Raj Kumar Mohan Singh* v. *Raj Kumar Pashupati Nath*, A 1970 SC 42.

4 *Karanpura Development Co. Ltd.* v. *State of Bihar*, 68 CWN 965.

5 *V.T. Elaya Pilai* v. *Ramaswami*, A 1947 Mad 165, (1946) 2 MLJ 373, 1946 MWN 745.

6 *Padmini Mishra* v. *Ramesh Chandra Mishra*, A 1991 Orissa 263.

7 *Kartar Singh* v. *Kanhai Singh*, A 1989 M P 322.

irreparable loss to the opposite party[8] or will result in mutually destructive pleadings.[9]

The true position appears to be that any delay in applying for amendment is a material factor to be considered by the court before exercise of its discretion. Depending on the facts and circumstances of the case, amendment may be allowed not withstanding the delay or it may be rejected.

When Amendment should be Refused : The exceptional circumstances under which an amendment should be refused are the following:

1. Where amendment is not necessary for the purpose of determining the real question in controversy between the parties:

Where, after the close of the plaintiff's case, the defendant applies for amendment of his written statement for the purpose of taking a purely technical objection to the maintainability of the plaintiff's suit, the application may be rejected.[10] The object being to enable the real questions in dispute to be raised in the pleadings, leave to amend cannot be granted to the plaintiff, where the proposed amendment would not help him in substantiating his claim, and to the defendant when the proposed amendment would not help him in supporting his defence. Thus in a case where A sues B and seeing that the claim against B would fail, he applies for impleading C as defendant, the application will be refused if the court finds that A would not be entitled to any relief against C also.

"The questions in controversy" mean questions which are in controversy between the parties when written statement is filed but not questions which parties neither wish nor intend to dispute till that stage but which at a later stage they may think of raising.[11]

2. Where the amendment would cause to the opposite party such injury as cannot be compensated by costs :

Thus, leave to amend will be refused if it would prejudice a right

8 *Dewan Chand* v. *Kalyan Das*, A 1988 P&H 43.

9 *Gurdwara Committee* v. *Jaswant Singh*, 1996 (2) SCC 690.

10 *Collete* v. *Goode*, (1878) 7 Ch D 842, 47 LJ Ch 370, 150 LT 550; *South India Corporation* v. *State Trading Corporation*, A 1970 Ker 138.

11 *Beniprasad* v. *Narayan Glass Works*, A 1949 Ajmer 19; *Mohar Das* v. *Sarjoo*, (1972) 2 SLJ 146.

already accrued to the other party on the pleading as then standing.[12] A sued a Tramway Company for damages caused by negligence. The defendant merely denied the negligence. Six months later, an application was made for adding the plea that the liability to maintain the roads had been transferred to a local authority which, and not the defendant, was liable. As on the date of this application the suit had become barred against the local authority, leave to amend was refused, because, if amendment were allowed, the suit would fail.[13] Similarly, the addition of a new cause of action after the period of limitation is generally refused.[14]

Where an amendment is refused by the trial court as very late, the Appellate Court is justified in not interfering, if its effect is to interfere with the rights of parties regarding the plea of limitation.[15] Thus a suit for rent was not allowed to be converted into one for damages for use and occupation at a time when a suit for the latter relief would be barred by limitation,[16] and suit for declaration was not allowed to be converted into one for possession when the relief for possession was barred.[17] A plaintiff who had obtained a mortgage in his favour and afterwards a sale deed and sued for possession on the basis of the sale-deed was not allowed to amend the plaint so as to base his suit on the mortgage as a suit on the mortgage was barred by limitation on the date of the application for amendment.[18] Where no special circumstances were shown an amendment sought by an agent in a suit for rendition of account against his principal by

12 *Karsondas* v. *Surujbhan*, 145 IC 630, 35 BLR 229, A 1933 Bom 450; *Sanatan Mohapatra* v. *Hakim Mohammad Kazim Mohammad*, (1977) 1 CWR 474, A 1977 Ori 194.

13 *Steward* v. *North M.T.Co.*, (1886) 16 QBD 556.

14 *Mcleod & Co.* v. *Ivan Jones*, 87 IC 218 Cal; *Kulwant Singh* v. *Sher Singh*, 1971 Gur LJ 924; *L.J.Leach & Co. Ltd.* v. *Jardine*, A 1957 SC 337; see also, *Bisweswar* v. *Jineshwar*, A 1968 Cal 213; *Thommen Themm* v. *Vsuran Khan*, ILR (1967) 1 Ker 368, (where amendment was allowed beyond limitation).

15 *Sanathana Krishna* v. *Chellappa*, 101 IC 390, 38 MLT 345; *L.J. Lench & Co.* v. *Jardine*, A 1957 SC 357; *Charan Das* v. *Amir Khan*, A 1921 PC 50, 57 IC 606.

16 *Veerabhadra* v. *Vythanathsami*, 99 IC 977 Mad; *Muni Lal* v. *The Oriental Fire and General Insurance Co. Ltd.*, 1995 (4) OCC 375 (SC); see also, *Chinta* v. *Gunna*, 133 IC 497, A 1931 Mad 542, 61 MLJ 316.

17 *Damar* v. *Jagdip*, 165 IC 21, A 1936 Pat 535; see also, *Bhup Narain* v. *Hiralal*, A 1936 Pat 186.

18 *Chunilal* v. *Abdul Dawood*, A 1948 Bom 140.

introducing a prayer for recovery of a specified sum was not allowed.[19]

In special cases, however, amendments after the period of limitation have been allowed. For instance, where the cause of action is the same, but the plaintiff has made a mistake as to the appropriate remedy to which he would be entitled in law, amendment may be allowed even in second appeal, provided the error was *bona fide* (such as due to conflict in High Court rulings).[20] In another case, A, alleging that he had invested Rs. 4000/- as capital under a partnership agreement between him and the defendant, sued for dissolution of the partnership and for accounts, but it was clear from the proceedings of the trial court that A really intended to claim his Rs.4000/- and the defendant pleaded to the money claim, and that claim had been put in issue and evidence was adduced on it. The lower court found that the money was due, but dismissed the suit on the finding that the agreement set up did not constitute a partnership. The Apellate Court allowed the plaintiff to add a prayer for the recovery of Rs. 4,000/- though at the date of amendment the claim for money was barred by limitation.[1] In another case, plaintiff was allowed to convert a suit on a promissory note into one on original consideration after limitation on the ground that as the plaintiff could have originally made such an alternative claim he should not lose on a technical ground.[2] Similarly, in a suit for recovery of books of account against a servant, leave to add a prayer for recovery of money due from the defendant was allowed after the period of limitation.[3]

Similarly, a plaint may not be permitted to be amended so as to take away a valid defence of limitation.[4] Thus, when a suit on a loan alleged to have been taken on a particular day was dismissed as barred by limitation, an application for amendment so as to change the date of loan, given in

19 *Choubey Sushil Chandra* v. *Raj Bhadur*, A 1977 All 259.

20 *Mullaveetil* v. *Achutan*, 21 MLJ 475, 10 IC 218, 9 MLT 499.

1 *Kishendas* v. *Rachappa*, 33 B 644.

2 *Krishna Pd.* v. *Ma Aye*, A 1936 Rang 508, 165 IC 810; *Ippili Satyanarayana* v. *Amadalavalasa Co-operative Agricultural & Industrial Society Ltd.*, A 1975 AP 22.

3 *Sevugan* v. *Krishna*, 36 M 378, 13 IC 268.

4 *Ruliaram* v. *Ramchand*, 144 IC 822, A 1933 Lah 774; *Byash* v. *Ajodhiya*, A 1932 Rang 26, 10 R 74; *Parbhudas* v. *Lallubhai*, 137 IC 710, 34 BLR 35, A 1932 Bom 117; *Kesho Das* v. *Hari Kishan Das*, 17 Pat 268, A 1938 Pat 205, 1938 PWN 431,

second appeal was refused.[5] Where, however, the plaintiff's conduct has been *bona fide* throughout, even an amendment which deprived the defendant of the benefit of the rule of limitation may be allowed. In a case, questioning the correctness of a particular portion of the boundary line between two villages, the amendment sought to question other portions of the boundary line was thus allowed.[6] In another case, when defendant resisted the plaintiff's claim on the ground of limitation, an amendment by which plaintiff sought to plead an acknowledgment was allowed though applied for at a late stage, the court remarking that the delay may influence the court in deciding whether the acknowledgment was genuine or not, but the amendment should be allowed as it did not alter the nature of the case.[7] Similarly, in suit which was claimed to be within limitation from the date of a part payment, an amendment to add an acknowledgment also as an additional ground for saving limitation was allowed.[8] In another case the plaintiff claimed exclusion of a certain period from limitation but he was allowed to amend the plaint so as to claim extension from an acknowledgment contained in a letter produced and relied on by the defendant himself.[9] In another case on the basis of a pronote which was found to be technically void, an amendment to enable the plaintiff to sue on the original consideration was allowed even after the expiry of limitation on the ground of justice.[10] A suit based on an agreement recognising service was also allowed to be amended after limitation into a suit based upon service as the difference between the two kinds of suits was held to be only technical.[11]

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19 PLT 579, 175 IC 354, 10 RP 620; *Narayanamurti* v. *Surya Narayan*, 168 IC 980, A 1937 Mad 122.

5 *Addanki* v. *Madduri*, 96 IC 700, A 1926 Mad 827, 51 MLJ 414, 1926 MWN 392.

6 *Nagalingam* v. *Siva*, 140 IC 500, 63 MLJ 725, 1932 MWN 1116; see also, *A.K. Gupta & Sons* v. *Damodar Valley Corporation*, A 1967 SC 96.

7 *Kishenlal* v. *Ram Chandra*, 55 A 256, 145 IC 859, 1933 ALJ 268, A 1933 All 374.

8 *Muthammal* v. *Guruswami*, 97 MLJ 921; *Jogendra* v. *Debendra*, A 1937 Cal 485; *Satgur Nath* v. *Brahma Datta*, A 1937 Oudh 391, 168 IC 799.

9 *Fatehchand* v. *Vasudeo*, A 1948 Nag 334.

10 *Chellam Sakka* v. *Muthusamy*, 165 IC 503, A 1936 Mad 632; following, *Charan Das* v. *Ameer Khan*, 57 IC 606, 18 ALJ 1095, 25 CWN 289 (PC), A 1921 PC 50.

11 *Bai Kamala* v. *Shankar Rao*, A 1943 Bom 407.

For further discussion see heading "Amendment and Limitation", *post*.

3. Where the application for amendment is not made in good faith :

It is one of the necessary conditions for the exercise of the discretion of the court in allowing an amendment that the applicant must have acted in good faith.[12] When there is no substantial ground for the case proposed to be set up by the amendment,[13] or the object is to defeat or delay the plaintiff's claim,[14] or merely to re-agitate the same questions and lead further evidence,[15] the amendment was rejected as not being in good faith. Great delay in making the application has also been held to show it to be *mala fide*.[16] But it is not always that good faith or absence of it can be determined at the stage at which application is presented. There are cases in which this can be known only after the evidence is let in. The truth or falsity of case put in the amendment application is normally not considered while deciding whether to permit an amendment or not.[17] When the amendment proposed is likely to create and confer jurisdiction on the Court which patently was not available on the pleadings of the plaintiff, the amendment cannot be allowed.[18]

4. Where the amendment offends any provision of law :

It has been held that where the proposed amendment affronts a legal provision, it has to be rejected. In a suit for possession, the defendant took a plea that he was either the owner of the house in dispute or had become the owner thereof by having been in adverse possession for over

12 *Banta Singh* v. *Harbhajan Kaur*, A 1974 P&H 247 FB; *Muni Lal* v. *Niki Mamsa*, A 1977 H P 51; *Gopi Kishan* v. *Radha Kishan*, 1999 AIHC 908 Raj.

13 *Lawrence* v. *Norreys*, (1888) 39 Ch D 213, 38 WR 753.

14 *Mohomed Hussain* v. *Ko Maung*, 117 IC 563, A 1919 Rang 33; *Usha Sharma* v. *Bank of Baroda*, 1995 ARC 236, 1995 All CJ 140; 1995 RD 229 (All).

15 *Hodaun Ningal* v. *Khondrain Ningal*, A 1965 Manipur 14.

16 *Krishna* v. *Pachaiyppa*, 47 MLJ 540, 82 IC 492; *Beni Prasad* v. *Narayan Glass Works*, A 1949 Ajmer 19; Aisha v *State of J&K*, A 1978 J&K 34.

17 *Dharmalinga* v. *A.M. Krishnaswami*, A 1949 Mad 467, (1948) 2 MLJ 649, 1949 MWN 71; *Mangal Das* v. *Union of India*, A 1973 Delhi 96; *Dhirendra Kumar* v. *Rashmani Devi*, A 1986 Ori 133.

18 *Vikram Raitani* v. *Sangeeta Raitani*, 1995 AIHC 530 (All).

12 years. Subsequently he filed an application for amendment seeking to assert that he was the real owner of the house and that the plaintiff was a mere benamidar and the sale was effected in the name of the plaintiff with a view to avoid attachment and sale thereof at the instance of the creditors. The proposed amendment offended the provisions of Sec.53 of the Transfer of Property Act, and so was rejected.[19]

5. Where the plaint itself is not Maintainable :

A suit against a dead person is a nullity and cannot be amended by impleading his legal representatives.[20] Where the plaint is filed in contravention of the provisions of section 69(1) & (2) of the Indian Partnership Act, it has to be treated as a void plaint and no question of amendment of such plaint arises.[21] In a suit for dissolution of a partnership constituted against the provisions of section 59 (1) of the Motor Vehicles Act, leave to amend the plaint seeking restitution of the contribution made by the plaintiff towards the capital of the partnership was refused.[22]

6. Where the amendment would introduce a totally different, new and inconsistent case and the application is made at a very late stage of the proceedings :

An amendment of this character is not necessary for "determining the real question in controversy", it rather implies an abandonment of the real issue, and should not, therefore, ordinarily be allowed.[1] As a general rule, the court will not, in the exercise of such discretion, allow an amendment converting a suit of one character into a suit of another character in the absence of special circumstances.[2] The court cannot allow amendment involving the setting up of a new case or which altered the real matter in controversy.[3] The court may, in very rare cases and under

19 *Ram Singh* v. *Sona Devi*, 1988 HP 27.

20 *Joginder Singh* v. *Krishan Lal*, *A* 1977 P&H 180.

21 In the matter of *Abani Kanta Lal*, A 1986 Cal 143.

22 *Alirajan* v. *Govindsamy*, 1966 (1) MLJ 158.

1 *Gobardhan* v. *Sita Ram*, 164 IC 1085, A 1936 Pat 491; *Ram Jiwan* v. *Mt. Maharani*, A 1936 Nag 295; *Badridas* v. *Raja Pratapgir*, A 1940 Nag 9; *Jaldu Anantha Raghuran* v. *Jaldu Bapannarav*, A 1959 AP 448; *Hem Rajendra Bahuguna* v. *District Judge Nainital*, 1995 (I) ARC 311 (All).

2 *Ramsaran* v. *Mandar V. Mahabir Sahu*, A 1927 PC 18.

3 *Mashwe Maya* v. *Maung*, A 1922 P.C. 249; *Kanda* v. *Wagha*, A 1950 PC 68.

exceptional circumstances, allow even such amendments,[4] provided the application is made at a very early stage of the suit and long before the trial, and provided the change in the character of the suit is merely technical and not substantial. Amendment cannot ordinarily be allowed where it would convert the suit into one of a totally different character based on entirely different and wholly inconsistent allegations with the original plaint and would involve a fresh trial with fresh pleadings and fresh evidence.[5] In a suit for specific performance of contract, an amendment seeking right of pre-emption being inconsistent and contradictory cannot be allowed.[6] A suit for setting aside a decree on the ground of fraud was not allowed to be changed into one on the ground of *bona fide* mistake of the parties.[7]

In one case an amendment even introducing an inconsistent case was permitted on the ground that it met the ends of justice by allowing the whole question in dispute to be decided between the parties and in order to avoid unnecessary litigation.[8] In another case, an amendment introducing a new case of fraud was allowed just before judgment on payment of entire costs.[9] But the mere fact that an amendment seeks to state a case in the alternative is not by itself a sufficient ground for disallowing it.[10]

In a case[11] in which the plaintiff had sued for specific performance and compensation, an alternative plea (though raised about four years after the institution of the suit and just before trial), abandoning his claim for specific performance and claiming damages for breach of contract, maintaining all the allegations in the plaint as they formerly stood was allowed by the trial court whose decision was reversed by the High Court. Their Lordships of Privy Council while upholding the decision of the High Court held that the court technically had power to allow the plaintiff to change

4 *Sheonarain* v. *Ram Prasad*, 74 IC 317, A 1923 Nag 241; *Iqbal Begum* v. *Akhtar Ali*, A 1973 Punj 478.

5 *Badridas* v. *Raja Partapgir*, A 1940 Nag 9; *Aswath Rao* v. *Sushilabai*, A 1971 Mys 141; *Jagannath Sahoo* v. *Labanya Debi*, A 1981 Ori 12; *Gayatri Devi* v. *Om Prakash*, A 1985 All 356.

6 *Santosh Kumar Hui* v. *Prakash Kumar Palit*, A 1995 Cal 381.

7 *Shib Ram* v. *Md. Musaddar*, A 1947 Cal 17.

8 *Ghulam Haider* v. *Sardar Ali*, 73 IC 748 Pesh.

9 *Chartered Bank* v. *Imperial Bank*, A 1930 Cal 534, 57 C 398.

10 *Sobhanadri* v. *Venkataramayya*, 98 IC 458, A 1927 Mad 212.

11 *Ardeshir* v. *Flora*, A 1928 PC 208.

the character of his suit at that stage, but such amendments should not be allowed without proper appreciation of its serious effect upon the position of the parties in each individual case. Their Lordships further remarked : "Indeed, so serious in many cases is the exercise of this power that to their Lordships it would appear to be a wise precaution for a judge before allowing any such amendment in a contested case to require the plaint to be remodelled in a form appropriate to an action seeking compensation for breach of contract and nothing else. The extent and propriety of what is asked for will thus be made apparent and the amendment will be allowed or refused with a due appreciation of the position". In this case their Lordships were of the opinion that in the circumstances the plaintiff had lost his right to claim damages for breach of contract.

Amendment of a written statement may be refused on the ground that the applicant wanted, by the amendment, to take pleas inconsistent with those originally taken by him.[12] A defendant, who was sued for possession of *abadi* land on the ground that his transferor had a non-transferable licence therein and had admitted this fact in trial court, was not allowed to raise by amendment the new question that his transferor was proprietor of the land.[13] In another case, permission to amend a written statement so as to set up a plea of *jus tertii* in answer to the plaintiff's claim for recovery of possession was refused by the Appellate Court.[14] (For further discussion see heading "Stage at which Amendment may be allowed," *post.*)

An amendment, the effect of which is to change the cause of action on which the original suit was based or the specific legal relation alleged to exist between the parties, or the specific title on which the party bases his claim may not ordinarily be allowed. But there may be no objection to allowing an amendment which neither takes away the effect of any

12 *Fazal Nur* v. *Bibi Rani*, 120 IC 492 Lah; *Kundan Lal Verma* v. *Sushila Devi*, A 1972 Punj 283; *Chennai Vedantha Sangam* v. *Shanmugha Sundaram*, (1975) 1 MLJ 435; *Haji Md. Isaq* v. *Md. Iqbal*, A 1978 SC 798; *Bhuramal Agarwal* v. *Samla Dalurband Coal Co.*, 82 CWN 1; *Rajesh Vasudeo Pillai* v. *LIC.*, (1980) 1 AWR 265; *Bansilal Ganpatrai* v. *Bhoj Raj*, A 1980 HP 39; *Arun Kumar Biswas* v. *D.N. Majumdar*, (1985) 89 CWN 252.

13 *Chunnialal* v. *Decoram*, A 1948 Nag 119.

14 *Subhayya* v. *Chandrayya*, A 1941 Mad 811.

admission made in the original pleading, nor raises any inconsistent plea by changing the character of the pleading but merely elucidates and clarifies it.[15] When a plea of fraud is set up for the first time by amendment[16] or when one kind of fraud is alleged and another kind of it is sought to be susbsituted.[17] Where the plaintiff sued for redemption alleging title under a purchase and the defendant set up title under another sale-deed, and in appeal it was contended for the first time that the plaintiff's vendor had no title as he was not the nearest reversioner to the deceased, and thereupon the appellate court allowed the plaintiff to amend his plaint so as to trace his title from certain persons from whom his vendor got the properties, it was held that the amendment should not have been allowed as its effect was to allow the plaintiff to set up a new case in contradiction to that set out in the plaint.[18] Where the plaintiff had set out in the plaint a particular interpretation of the document which was the basis of the suit, an amendment whereby he wanted to set out a different interpretation was held not to change the character of the suit.[19]

Even where an alternative case which is not covered by the pleading were permissible it cannot, however, be entertained without a proper amendment of the pleadings. For in the absence of a formal amendment the other party may be denied the advantage he would have obtained from particulars and proper discovery and, in addition, he may not have come prepared with evidence to meet the new case.[20] Where the plaintiff changes the basis of his claim consequential amendment of defendant's pleading should not be refused.[21]

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15 *Satya* v. *Chudamani*, (1984) 58 Cutt LT 287; see also, *Zafrullah Khan* v. *Additional Distt. Judge*, 1984 All WC 600 (case law); *Maitreyee Banerji* v. *P.K. Mukherji*, A 1982 SC 17; see however, *Mohd. Shamin* v. *Delhi Waqf Board*, A 1985 Del 464 (wrong admission of law may be permitted to be withdrawn); *Panchdeo Narain* v. *Jyoti Sahai*, A 1983 SC 462, 1984 supp SCC 594 (even admission of fact may be permitted to be withdrawn).

16 *Mt. Kanta* v. *Kalawati*, A 1946 Lah 419 DB.

17 *Abdool Hasan* v. *Turner*, 11 B 620, 14 IA 111; *Municipal Corporation of Greater Bombay* v. *Lala Pancham*, A 1965 SC 1008.

18 *Ibramsa* v. *Mahomed Esuf*, 30 LW 557.

19 *Subramanian* v. *Vasudevan*, 160 IC 989, A 1936 Mad 151.

20 *Leavey & Co.* v. *Hirst & Co.*, (1943) 2 All ER 581, CA.

21 *G.L. Baker Ltd.* v. *Midway Bldg. Ltd.*, (1958) 3 All ER 540 CA.

In order to afford some help in the determination of this question it is proposed to set down here, with reference to rulings, some examples of amendments which amount to a change of character of the suit and of those which do not.

Examples of cases of amendments refused as amounting to a change in the character of the suit :

Claim for hire of cargo boats on the ground that defendant hired them from plaintiff; amended claim for agency account on the allegation that defendant was plaintiff's agent for procuring hirers.[1] Claim for dower on written agreement; amended claim for dower on custom.[2] Claim for money paid by the defendant on behalf of the plaintiff to X on the ground that the payment was unauthorised; amended claim for damages for defendant's negligence in selecting X as agent for the plaintiff.[3] Claim for declaration of title; amended claim for specific performance.[4] Suit for declaration of plaintiff's one-third share and joint possession on the ground that plaintiff had purchased a widow's right in one-third share and redeemed it from mortgagee in 1910; amended claim (after the defendant's plea of adverse possession) that the widow had herself redeemed in 1910 and plaintiff succeeded her in 1916.[5] Claim that land in suit was ancestral and hence the widow had no right to make the gift; amended claim that though land was non-ancestral, yet under a custom the widow would still be incompetent to dispose of it.[6] Claim that father made the sale to pay immoral debts; amended claim that the father could alienate his share only[7] (for in the former case joint family was alleged, in the latter the contrary). Claim based on gift by will; amended claim based on inheritance.[8] Claim for share of produce of property left undivided at partition; amended claim for partition of that property.[9] Claim for setting aside a decree for partition

1 *Shib Kristo Sircar* v. *Abdul Hakim*, 5 C 603.
2 *Khaja Md.* v. *Maiya Begum*, 14 C 420.
3 *Hamilton* v. *Land Mortgage Bank*, 5 A 456.
4 *Jiwanlal* v. *Allah Jawaya*, 133 IC 646, A 1931 Lah 595.
5 *Chandradat* v. *Ghulam Mohammad*, 93 IC 871 Lah.
6 *Kanda* v. *Waghu*, A 1950 PC 68.
7 *Sheonarayan* v. *Bhagwan Dutt*, 11 WR 10; *Narayan* v. *Javher*, 12 B 431.
8 *Jankee* v. *Jhajhoo*, 2 NWHCR 407.
9 *Gauri Shanker* v. *Atma Ram*, 18 B 611.

detailed in compromise into one based on recognition of the validity of that decree and for a relief arising from that decree.[10]

Claim for specific performance; amended claim to cancel the contract and retain the deposit.[11] Claim to redeem one mortgage; amended claim to redeem another.[12] Claim for ejectment; amended claim for declaration of reversionary rights.[13] Claim for property as *devisee* under a will; amended claim for the same on the ground of want of title in testator to devise.[14] Claim for possession as full owner; amended claim for defendant's ejectment by plaintiff as manager of *waqf* property.[15] Claim for redemption as mortgagor; amended claim to enforce a right as owner.[16] Claim for declaration that properties are trust property; amended claim that plaintiff has a life interest or charge for maintenance in them.[17] Claim based on custom of pre-emption; amended claim on contract, set up in the Appellate Court.[18] Claim of pre-emption on the ground that plaintiff is a co-sharer; amended claim on the ground of relationship.[19] Claim for possession; amended claim for redemption (in second appeal).[20]

Claim on account stated in a particular year; amended claim on account stated in a previous year after the former account stated was found to be a forgery.[1] Claim for dissolution and rendition of account of partnership; amended claim for remuneration as agent or servant of defendant.[2] Claim against the Secretary of State based on negligence; amended claim based

10 *Chiranjilal* v. *Ram Kanwar*, 1948 East Punjab 26.

11 *Stone* v. *Smith*, (1887) 35 Ch D 188.

12 *Govindrav* v. *Ragho*, 8 B 543; *Pratap* v. *Ram Sewak*, 96 IC 304 (where amendment was applied for in second appeal); contra, *Parashor* v. *Gama*, 5 BLR 643, (where alternative case was set up by the amendment).

13 *Ramanandan* v. *Pulikutti*, 21 M 288; contra, *Gurdit Singh* v. *Mt. Parmeshri*, 19 IC 928, 1913 PLR 238, 1913 FWR 142.

14 *Mylapore* v. *Yeo Kay*, 14 C 801, 14 IA 168.

15 *Ramdas* v. *Daulat Ram*, 1913 PLR 225, 18 IC 807, 1913 PWR 114.

16 *Nank To* v. *Ma Hanin*, 36 IC 5, 9 Bur LT 150; *U. Naing* v. *Ko Sein*, A 1938 Rang 125, 176 IC 631.

17 *Nazir Ahmad* v. *Taj Mahal Begum*, A 1940 Lah 63, 186 IC 828.

18 *Ram Garib* v. *Shanker*, 20 ALJ 15, 66 IC 242.

19 *Baijnath* v. *Ram Pyari*, A 1947 All 221.

20 *Munna Lal* v. *Makiulal*, 24 IC 723 All; *Kalane* v. *Virupak Shapa*, 7 B 146.

1 *Bhairon Prasad* v. *Gajadhar Prasad*, 23 IC 587, 19 CWN 170.

2 *Mclverny* v. *Secretary of State*, 13 IC 370, 38 C 797.

upon nuisance.[3] Claim for ejectment; amended claim for partition.[4] Claim for redemption; amended claim by the representative of the plaintiff who died *pendente lite* that the mortgage was not binding on him.[5] Claim for rent; amended claim for damages for breach of an agreement to take on lease.[6] Suit based on allegation setting out grounds for non-performance of a contract; amended claim denying the contract.[7] Claim for redemption; amended claim for avoidance of a sale on payment of a portion of the consideration money.[8] Claim for possession after declaration that the defendant's mortgage was fictitious; amended claim for redemption of that mortgage.[9] Claim for redemption; amended claim for possession on the ground that the mortgage is not binding on the plaintiff as it was without consideration and without necessity.[10] Suit by A against his partner B, after dissolution of partnership, for price of articles supplied by A to B during partnership; amended claim for accounts of partnership.[11] Claim by unregistered partnership; amended claim by a partner as proprietor thereof.[12]

Claim on the footing that defendant was carrier; amended claim based on his liability as bailee.[13] Claim for annuity by sale of mortgaged property; amended claim for 12 years' annuity.[14] Claim as *krittima* son; amended claim as *appathitta* son.[15] Claim as owner; amended claim in second appeal as *benamidar* when plaintiff had from the beginning repudiated that character.[16] A suit for specific performance and damages against a Hindu father and his joint sons; after the death of father, specific

3 *Valthilinga* v. *Minigan*, 37 M 529, 23 MLJ 189, 15 IC 299, 1912 MWN 1127.
4 *Ram Sahai* v. *Alopi Prasad*, 148 IC 243, A 1934 Lah 38; *Divi Sheshacharyulu* v. *Divi Lakshmi Narayan*, A 1946 Mad 105.
5 *Inaganti* v. *Venkataligama*, 68 IC 703.
6 *Karam Chand* v. *Hardyal*, 11 IC 849, 4 Bur LT 181.
7 *Krishnamachariar* v. *Arunachala*, 105 IC 563, A 1927 Mad 793, 1926 MWN 668.
8 *Ram Bilas* v. *Brij Narain*, 14 IC 743, 11 MLJ 424.
9 *Laxmi Shanker* v. *Haujab Bhai*, 44 B 515, 57 IC 426, 22 BLR 735.
10 *Tohlu* v. *Buta*, 67 IC 132, 3 LLJ 184.
11 *Beragi* v. *Raja Ram*, 10 IC 250, 163 PLR 1911.
12 *S. Krishnan* v. *Aruna*, (1979) 2 MLJ 1.
13 *Louis Dreyfus & Co.* v. *Secretary of State*, 45 IC 173, 11 SLR 103.
14 *Masuma* v. *Tahira*, 11 ALJ 580, 19 IC 661.
15 *Maung Ba* v. *Ma Than*, A 1926 Rang 49, 3 R 83, 92 IC 253.
16 *Kulsambai* v. *Mandwiwalia Firm*, A 1939 Sind 281.

performance given up and suit for earnest money as money had and received by the father.[17] Suit against manager of idol personally, suit against the idol.[18] Suit for accounts of partnership started in 1921; suit on partnership started in 1919.[19] Suit for price of goods sold, amended claim (in second appeal) for damages for wrongful sale of goods by purchaser.[1] Suit for partition; amended for administration.[2] Claim that certain transactions were vitiated by fraud and undue influence; amended claim that though the transactions were valid they would not bind the estate or plaintiff's successor.[3] In a matrimonial suit, change of defence at appellate stage when it was inconsistent with original factual plea.[4] Change of ground of exemption from limitation from one of payment under section 20 to one of acknowledgment under section 19 of the old Limitation Act of 1908.[5] Claim that the sales made by guardian were void *ab initio* and were liable to be ignored, amendment after expiry of period of limitation for setting aside the sale deed.[6]

In a suit plaintiff claimed a sum to be ascertained on taking account and afterwards added new defendants against whom no relief was claimed. On the suit being dismissed on a technical ground, the plaintiff on appeal wanted to amend the plaint so as to claim a declaration of his title to a specific portion of the amount held in deposit by the original defendants and also claimed a relief against the added defendants. The court disallowed such an amendment.[7] In a suit *for* account amendment to convert the suit into one *on* account was refused on the ground that the plaint would require amendment in many particulars and a second suit would not be barred by limitation.[8] A suit for redemption on ground of

17 *Ramasaran* v. *Mahabir*, A 1926 PC 187, 100 IC 56, 25 ALJ 74, 1927 MWN 69.
18 *Avadh Behari* v. *Parmeshur*, 6 OWN 1036.
19 *Haji Adam* v. *Nihal*, A 1933 Sind 131, 144 IC 25.
1 *Baijnath* v. *Joharchand*, A 1933 All 404, 144 IC 82, 1933 ALJ 1000.
2 *Ma Waung Ma Gyi* v. *Ma Bu Gyi*, 174 IC 39, A 1937 Rang 525.
3 *V.T.Elaya Pillai* v. *Ramasami*, A 1947 Mad. 165, (1946) 2 MLJ 373, 1946 MWN 745.
4 *Saroj Rani* v. *Sudarshan Kumar*, (1985) 1 CCC 127 (SC).
5 *Thakurdas* v. *Sant Ram*, A 1949 East Punjab 219.
6 *Vishwambhar* v. *Laxminarayana*, A 2001 SC 2607.
7 *Mohd. Ara Husain* v. *Nawab Bagar*, 171 IC 33, A 1937 Oudh 484.
8 *Mulomal* v. *Tarachand*, A 161 IC 505, 1936 Sind 9.

satisfaction filed nearly 60 years after the mortgage without an offer to pay whatever might be found due was not allowed to be amended by addition of such offer.[9] To a suit for dissolution of partnership defendant made a counter claim based on a term of partnership restraining the plaintiff from engaging in rival business; the plaintiff contended that it was agreed that this clause would not be enforced and prayed for amendment of plaint by including a prayer for rectification. The Bombay High Court held that this would change the character of the suit.[10]

In a case which was remitted by the Full Bench, the plaintiff sought amendment of the plaint in order to negative the decision of the High Court. The amendment was refused as it would have nullified the earlier decision of the High Court.[11] In a partition suit, on the death of the defendant, the plaintiff sought amendment to claim the entire property as heir of the defendant. The amendment was refused on the ground that it would change the cause of action by converting the partition suit into a suit for title and possession.[12] In a suit for declaration that a document in question was a deed of mortgage and not a deed of sale, an application for amendment to the effect that the document was void and seeking a consequential prayer for a declaration to that effect was not allowed.[13]

Examples of cases of amendments not amounting to a change in the character of the suit.

Claim for declaration; amended claim for consequential relief.[14] Claim for declaration of title and possession of alluvial land; amended claim to include title by local usage not originally alleged.[15] Claim for declaration that defendant had no title or possession and claim that the property had been purchased *benami* in defendant's name.[16] Claim for declaration that

9 *Purshottam* v. *Vasant*, A 1943 Bom 259, 45 BLR 489.
10 *Ram Jahn* v. *Yahyabhai*, A 1947 Bom 149.
11 *Mohd. Jaffar Ali* v. *Rajeshwar Rao*, A 1971 AP 156 (FB).
12 *Ashwath Rao* v. *Sushila Bai*, A 1971 Mys 141.
13 *Muthupandian* v *Ramasamy Thevar*, A 1995 Mad 277.
14 *Limba* v. *Rama*, 13 B 548; *Chomu* v. *Umma*, 14 M 46; *Purna Chandra* v. *Sabrui*, 35 CWN 620; *Bal Mukund* v. *Madan*, A 1935 Lah 91; contra, *Sriram* v. *Khwaja*, A 1934 Lah 235, (plaintiff had persisted and prayed for amendment in appeal).
15 *Shahabuddin Sarcar* v. *Kafiluddin Tapadar*, ILR (1938) 1 Cal 361.
16 *S.K. Wajid Ali* v. *Mst. Jiga Bai*, A 1968 Ori 163.

plaintiff and defendant are joint owners of money in the hands of the deceased as they were both his heirs; claim for administration of the estate of the deceased.[17] Claim for direct possession; amended claim for possession conditional on the defendant's failure to redeem.[18] Claim for injunction restraining defendant from tying cattle on plaintiff's land; amended claim for possession.[19] Claim for injunction to restrain certain constructions by neighbour, so that plaintiff's building may not be damaged; amendment to claim compensation for damage already caused and for continuing damages.[20] Claim for injunction in respect of immoveable property, the title to which was in issue; amendment to claim possession over same.[1]

Claim based on *hundi* or promissory note; amended claim based on original consideration independent of the *hundi* or promissory note,[2] even though the suit may be barred by limitation on the date of the amendment.[3] Claim based on acknowledgment, amended claim based on previous original transaction allowed after limitation on the ground that though new, the amended claim was not inconsistent.[4] Suit on pronote executed on the basis of the amount outstanding in the books of account of the plaintiff; amended claim on the original loan in the alternative.[5] Claim for exclusive

17 *Mt. Latifanbai* v. *Mt. Sakinabai*, 181 IC 770, A 1939 Sind 107.

18 *Nilkanth* v. *Suresh Chandra*, 12 C 414 (422), 12 IA 17; *Dullabh Das* v. *Lakshmandas*, 10 B 88.

19 *Syed Waris Ali* v. *Syed Abbas Ali*, 85 IC 344 Oudh.

20 *Gopal Chandra* v. *Life Insurance Corp.*, (1984) 58 Cutt LT 352.

1 *Nabi Baksh* v. *Angney*, 105 IC 784, 4 CWN 975; *Dindappa Laxmappa* v. *Malappa Bhimappa*, (1975) 2 Karn LJ 239.

2 *Sundar* v. *Puran*, 10 PWR 1906, A 1922 Lah 394; *Indubala* v. *Lakshminarayan*, 60 CLJ 91, 38 CWN 1146; *Kamakshi* v. *Subbaraya*, 52 IC 758 Mad, (in this case it was further held that no written application for amendment was necessary); *Varadaraja* v. *Venkatarama*, 99 IC 625, A 1927 Mad 378; *Ramchandra* v. *Keshab*, 61 C 433, 38 CWN 488, 150 IC 982, A 1934 Cal 554; *Puranmal* v. *Kapilmani*, 334 ALJ 989; *Abdul Wahab* v. *Arjarna*, 42 LW 574, A 1935 Mad 888; (but such amendment was not allowed in, *Anantaramayya* v. *Narasomy*, 67 ALJ 918, as it was applied for after the conclusion of trial when suit had become time-barred), contra, *Burjorji* v. *Harmusji*, A 1932 Bom 394, 34 BLR 643, 137 IC 783; *Chellam* v. *Muthusamy*, 165 IC 503, A 1936 Mad 632; *Official Assignee* v. *Kuppuswami*, 165 IC 301, A 1936 Mad 785.

3 *Krishna Prasad* v. *Ma Aye*, A 1936 Rang 508, 165 IC 810.

4 *Seth Mangilal* v. *Zam Singh*, 196 IC 190, A 1941 Nag 289.

5 *Rajaranka Pulp Paper Mill* v. *Central Bank of India*, 1974 MLJ 985.

possession; amended claim for joint possession.[6] Claim for possession as transferee from owner; amended claim as heir of the owner who died *pendente lite*.[7] Claim on a mortgage; amended alternative claim that money was advanced on defendant's fraudulent representation that he was major.[8] Claim on a registered mortgage-deed; amended claim on equitable mortgage for a personal decree.[9] Claim for unpaid purchase money on the ground of Vendor's lien; amended claim for the same money as damages for breach of contract.[10]

Claim on a mortgage bond executed by defendant's guardian; amended claim for old debts which were the consideration of the mortgage.[11] Claim for money borrowed from plaintiff; amended case that loan was advanced by plaintiff's father.[12] Claim on pronote against the brother of the deceased executant on the ground that defendant had acknowledged the debt; amended claim on the ground that the executant being elder brother, executed it for the benefit of the joint family.[13] A executed a pronote in favour of B in 1923, afterwards he transferred all his property to his son C who renewed the pronote in 1926. B sued on the later pronote and on finding it inadmissible in evidence sought to amend the plaint so as to base his suit on the pronote of 1923 and to implead A also, held that the amendment did not introduce any new or inconsistent claim and could be allowed.[14] Similarly, when plaintiff based his suit on two mortgages of 1927 and 1932, the former having been incorporated in the latter, and on defendants pleading invalidity of the latter, sought to base the claim on the former alone, it was held that there was no new case.[15] Claim for money due on taking accounts of a dissolved partnership;

6 In re, *Purvala*, 12 MLT 159, 15 IC 665, 1012 MWN 1116.
7 *Inder Deo* v. *Ramcharitter*, 74 IC 971, LR 5 A 28, A 1923 All 560.
8 *Saral Chang* v. *Mohan Bibi*, 25 C 371, 2 CWN 201.
9 *P.M. Chettyar* v. *Ma Shwe*, 101 IC 628, 6 Bur LJ 49, 5 R 115.
10 *H.B. Morton* v. *Woodfall*, 28 PLR 15, 9 LLJ 2599, 8 Lah 257, A 1927 Lah 103 DB.
11 *S.V. Nallaperumal* v. *R. Ponnayya*, 97 IC 936, A 1926 Mad 1124; *Eusoof* v. *Niemeyer*, 1940 Rang LR 603.
12 *Ghulam* v. *Mst. Fateh*, A 1934 Lah 974.
13 *Sampat* v. *Subhkaran*, 196 IC 511, 1941 OWN 112, A 1942 Oudh 161.
14 *Ayar Husain* v. *Ram Sarup*, 130 IC 347, 7 CWN 1195, A 1931 Oudh 54; *Abdul Wahab* v. *Anjone*, A 1935 Mad 888, 42 LW 574.
15 *Kannalal* v. *Bhagwandas*, A 1949 Nag 5.

amended claim for share of plaintiff out of the balance which was found on the settlement of account between the parties after dissolution.[16] Claim for specific sums as profits on account of rent of land and hire of furniture and fittings used by the defendant as a partner; amended claim for damages for use and occupation and in the alternative for mesne profits.[17]

Claim based on title as heir to husband who got the property on partition with his brothers; amended claim based on adverse possession against the defendant,[18] and claim for possession on the basis of will; amended claim as owner by adverse possession.[19] Claim by employee against employer for damages for negligence or breach of statutory duty in regard to safety of work; amended claim adding negligence on the part of fellow employee thus raising an issue of vicarious liability, which was held to constitute a mere extension of the original claim and not a new cause of action.[20] Claim on money due under time-barred agreement; amendment pleading acknowledgment saving limitation; as acknowledgment merely saves an existing cause of action from the bar of limitation.[1] Defence of denial of negligence; amendment pleading in the alternative that plaintiff was himself negligent.[2] In a suit for partition, the defendants raised a plea that the suit was bad for partial partition as certain items of joint property had been left out, amendment to include joint properties.[3] Claim for partition; amended claim for possession of plaintiff's share if defendant's story of previous partition is proved.[4]

Claim for general account added to a claim for partition of joint family property; amended claim for specific sum of Rs.10,000 said to have been collected for the family but kept with himself.[5] Claim for possession by reversioner against widow and daughter; amended claim

16 *Radha Kishen* v. *Motilal*, A 1933 Nag 82.

17 *Irgan Ahmad* v. *W.A. Khan*, A 1972 All 15.

18 *Mangammal* v. *Rangappa*, A 1935 Mad 137.

19 *Prakash Chandra* v. *Raja*, 1975 Rev. LR 170; *Gulwant Kaur* v. *Mohinder Singh*, A 1972 Punj 260.

20 *Dorman* v. *J.W. Ellis & Co.*, (1962) 1 All ER 303 CA.

1 *Busch* v. *Stevens*, (1962) 1 All ER 412.

2 *Turner* v. *Ford Motor Co.*, (1965) 2 All ER 583 CA.

3 *Mohd. Mustaffa* v. *Abubaker*, A 1971 SC 361, (1970) 3 SCC 891.

4 *Gulzari* v. *Dumman*, 97 IC 796, A 1926 Lah 460, 27 PLR 161.

5 *Kunhilakshmi* v. *Krishna*, A 1948 Mad 460, 1948 (1) MLJ 274, 1948 MWN 245.

for declaration of plaintiff's right to succeed after widow's death.[6] Claim by one co-obligee of a bond for his share of the money; amended claim for the whole money.[7] Suit based on acknowledgment said to be of a cash advance, amended suit based on previous original transactions (after the defendant had himself summoned plaintiff's account books to show that there were previous dealings and no cash was received as alleged by plaintiff at the time of acknowledgment).[8] Claim based on custom; amended claim that plaintiff is entitled even if custom is not proved.[9] Claim based on estoppel by judgment; amended claim based on a plea of estoppel in *pais*.[10] Claim for rent against three persons in respect of land alleged to have been held at a particular *Jama*; amended claim that the rental had been split up as a result of transfer by one defendant to others.[11] While in a suit described in the cause title of the plaint as one for malicious prosecution, the words "malicious prosecution", were omitted in one para of the plaint and the word "malicious" was omitted in another, held the amendment supplying those words did not change the character of the suit.[12] Where a suit for partition was brought by a residuary legatee before the administration was complete and residue was ascertained and the ascertainment of residue was only a formal matter, amendment by adding a prayer for administration was allowed.[13]

Different Kinds of Amendment : Amendment may be in respect of the form, or the substance of the pleading, or in respect of the relief claimed, or of the parties to the suit.

1. Formal Amendment : A formal amendment should generally be allowed. For example, any defect in signature or verification in a pleading,[14] omission of an averment in plaint that notice under section 80, C.P.C. had been delivered,[15] mis-description of the property in

6 *Gurditi* v. *Parmeshri*, 19 IC 928, 208 PLR 1914.
7 *Raghunath* v. *Mt. Prana*, 166 IC 992, A 1937 Oudh 290.
8 *Sitaram* v. *Nand Ram*, 78 IC 234 Nag.
9 *Md. Ghafor* v. *Mehdi*, 17 IC 326, 12 CLL 253.
10 *Zingu* v. *Mehadeo*, A 1948 Nag 358.
11 *Kameshwar* v. *Mohd. Nasam*, 21 PLT 440.
12 *Rohini Kumar* v. *Niaz Mohommad*, A 1944 Cal 4.
13 *Jiban Krishna* v. *Jatindranath*, A 1949 FC 64.
14 Vide *Chapter* V *ante*.
15 *Governor General* v. *Kasi Ram*, A 1949 Pat 268.

dispute,[16] mistake in the name or addresses of the parties,[17] mistake of calculation,[18] given in the plaint, slips of pen and other errors of a purely formal nature not affecting the merits of the pleadings are treated as mere irregularities and can always be rectified. Thus amendment should be allowed when there is no change in the cause of action but merely a change in the date when the cause of action arose.[19] A much wider power has been conferred on the court by section 153, C.P.C. than by O.6, R. 17, in this respect. While the powers under O.6, R. 17 cannot be exercised after the final determination of the proceeding in the case, those under section 153, can be exercised "at any time", even years after the final disposal of a case, when any mistake in the plaint (such as wrong description of property) is detected, e.g. at the time of execution of the decree.[20]

2. Amendments as to Substance : The circumstances under which an amendment in the substance of the pleading can, and those under which it cannot be allowed, have already been discussed above.

3. Amendments as to Relief : If the amendment in, or addition to, the original relief is such as to change the character of the suit, it shall not be allowed, nor will the court, in its discretion, generally allow it if the application for amendment is made at such a late stage of the suit that it would create a necessity of trying the case *de novo*,[1] or would be unfair to the other party, as when a suit for possession contested by defendant was decreed on defendant's withdrawing the contest and confessing judgment and the plaintiff wanted to amend the relief in appeal by claiming mesne profits, the court observed that had mesne profits been claimed in the beginning the defendant might not have withdrawn the contest about title.[2] In other cases, it may be allowed. Thus, a mortgagee suing for sale may amend his plaint by asking merely for a money decree,[3] but not in

16 *C.M. Vereekutty* v. *C.M. Mathukutty*, A 1981 SC 1535; *Puna* v. *Dinbandhu*, (1984) 58 Cutt LT 295.

17 *Md. Yusuf* v. *Himalayan Bank*, 18 A 198 (*Gulam Muhammad* v. *Himalaya Bank*, 17 A 292 overruled); *Dayamavi* v. *Sanker Nath*, A 1926 Cal 417, 42 CLJ 30 DB.

18 *Punjab National Bank* v. *Lalji Tandon*, A 1984 All 381.

19 *Alapati* v. *Dasari*, 49 MLJ 664, 91 IC 98, A 1926 Mad 128 (2).

20 *Satya Narayan* v. *Purnayya*, 131 IC 6, A 1931 Mad 260, 61 MLJ 805.

1 *Narayana* v. *Sankuni*, 15 M 255; *Ramananda* v. *Pulkutti*, 21 M 288.

2 *Mahalaxmi Bank* v. *Province of Bengal*, A 1942 Cal 371.

3 *Kashinath* v. *Sadasiv*, 20 C 805; *Sukhdeo* v. *Lachman*, 24 A 456.

second appeal,[4] or a vendor suing for recovery of unpaid purchase money may claim it by enforcement of a charge to bring the suit within 12 years's limitation[5], or a purchaser suing for specific performance may add a prayer for refund of the earnest money in the alternative,[6] or a plaintiff suing for possession of land sold may be allowed to claim refund of the price on the sale being found to be legally defective,[7] or a plaintiff suing for declaration may add a prayer for consequential relief.[8]

In a suit for cancellation of the sale deed, the alternative relief of possession, was allowed at the appellate stage.[9] In fact, if on the facts alleged in the plaint, a plaintiff can seek several reliefs together or in the alternative, and he has sought only some of them, he can amend his plaint by adding a prayer for the others at any stage of the suit,[10] and a suit would not be dismissed simply because the plaintiff had misconceived the appropriate relief to which he was entitled.[11] So, in a suit by one of several co-obligees of a bond for his share only, the plaintiff should be given permission to include the whole claim.[12] Similarly, in an appeal against the whole decree by one of the two defendants, the appellant was allowed to amend the memorandum of appeal by increasing the valuation.[13] In a suit for wrongful dismissal plaintiff who claimed the pay for a certain period as damages was allowed to amend the plaint so as to claim the amount as pay and not as damages.[14] In another suit for a declaration that plaintiff

4 *Gajadhar* v. *Ambika Prasad*, 41 CLJ 540, A 1925 PC 167.

5 *Daw Maya* v. *U Po Maya*, A 1934 Rang 266, 151 IC 125 (under Limitation Act 1908).

6 *Ibrahim Bhai* v. *Fletcher*, 21 B 827.

7 *Chaudhri Hakam Ali* v. *Hashu*, A 1938 Lah 244.

8 *Ragho* v. *Vishun*, 5 BLR 329; *Limba* v. *Rama*, 13 B 548; *Chomu* v. *Umma*, 14 M 46; *Bikram Singh* v. *Ram Babu*, A 1981 SC 2036.

9 *Shyam Dulari* v. *Bhagwan Das*, A 1979 All 192.

10 *Nararanam* v. *Ratnasabapathy*, 28 IC 828, 22 MLJ 464; following, *A.R.R.M.S.V Sevngan Chetty* v. *Krishna Aiyangar*, 36 M 378; *E.K.S. Chettaryor* v. *Maung Min*, A 1933 Rang 247; *Satyabhama* v. *Sailabala*, A 1984 Ori 181.

11 *Abdul Kadir* v. *Bangaru*, 10 IC 260, 1 MWN 270, 9 MLJ 429.

12 *Raghunath Prasad* v. *Prana*, 13 Luck 157, 1937 OWN 163, 166 IC 992, A 1937 Oudh 190.

13 *Sarat Chand Patnaik* v. *Baidyanath Patnaik*, 1938 PWN 525.

14 *Krishna* v. *Gomathi*, A 1945 Mad 33; *Jatindranath* v. *Corporation of Calcutta*, A 1945 Cal 144.

had never been dismissed or that he still remained in service, when it was held that this relief could not be given, the Federal Court allowed time to amend the plaint so as to claim damages for wrongful dismissal.[15] Where a minor filed a suit for accounts of a partnership alleging that the release given by his mother was not legally binding as she was not his legal guardian, he was allowed to add a definite prayer for a declaration that the deed of release was not valid and binding.[16]

A plaintiff can always reduce the amount claimed by him,[17] or amend the relief so as to bring it within the court-fee paid by him.[18] But the Oudh Chief Court in a case refused to allow a plaintiff in appeal after the arguments had been heard to reduce the valuation in order to save the payment of deficiency in court-fee.[19] Where the value of the suit is beyond the pecuniary jurisdiction of the trial court, it cannot entertain an application for cutting down of reliefs so as to bring the suit within its jurisdiction, but should return the plaint for presentation to the proper court. The plaintiff may then present the plaint to the same court again after striking out any relief or reducing the valuation.[20] The view of the Allahabad High Court is that even when a court has no jurisdiction to try the suit, it has jurisdiction to pass an order allowing an amendment of the plaint.[1] A plaintiff can also be allowed to increase the valuation if he makes an application at the beginning of the trial,[2] and within limitation. Amendment cannot be disallowed merely on the ground that it will result in ousting the jurisdiction of the court; after such amendment is allowed, the plaint can be returned for presentation to proper court.[3] Where in a suit to declare the mortgage of *Tarwad* property by the manager invalid, a part of the consideration is found to be binding,

15 *Secretary of State* v. *I.M. Lall*, 1945 FC 47.

16 *Mutha Krishna* v. *Sankara*, A 1934 Mad 317, 148 IC 869, 193 MWN 478.

17 *Sayadunnissa Khatun* v. *Gaibanha Loan Co.*, 172 IC 987, 19 OL 562, 65 CLJ 199, 10 RC 471.

18 *Gaindarmal* v. *Madanlal*, A 1948 East Punjab 30.

19 *Ibn-ul-Hasan* v. *Usman Ahamd*, 1938 AWR 131, 1938 OWN 1108, 178 IC 635.

20 *Mani* v. *Paumlu*, A 1928 Mad 559, 111 IC 737; *Zohara Khatoon* v. *Md. Zaki Alam*, A 1978 Cal 1133.

1 *Kunday Lal* v. *Narain Lal*, 1957 ALJ 738; *Capt. S.V. Daniels* v. *Gregory Warden Friendly Trust*, 1958 ALJ 437.

2 *Vinayaga* v. *Parthasarathy*, 45 IC 566, 32 MLJ 31.

3 *Benisham* v. *Mahadeo*, A 1985 Bom 462.

the plaintiff can add a relief for redemption of the mortgage on payment of the binding portion of the debt.[4] But a relief struck out cannot be reintroduced by amendment in appeal.[5]

Where, owing to altered circumstances, the relief becomes inappropriate, court may permit any suitable amendment to the relief. Therefore, in a suit for recovery of possession and mesne profits when receiver was appointed, a prayer for damages for the period after the receiver's appointment could be joined with a prayer for mesne profits for the preceding period.[6] If during the pendency of suit for injunction, plaintiff is dispossessed he can be allowed to add relief of possession by amendment,[7] and if during such pendency he has suffered damage, to add the relief of compensation.[8] But where specific performance could not be granted as the land had been acquired by government under Land Aquisition Act, application made in appeal for adding the alterative relief of damages was rejected on the ground that Land Acquisition proceedings were pending when the suit was filed yet plaintiff elected to pursue his remedy of specific performance.[9]

Where, by virtue of the extension of statute to the area in question, the defendant became entitled to new ground of relief, the amendment of the written statement adding such other grounds was allowed.[10] An amendment which does not prejudice the defendant or takes him by surprise or does not revive time-barred claim can be allowed.[11] An amendment of plaint by substituting appropriate reliefs necessitated by subsequent Privy Council decision was allowed.[12]

4 *Mani* v. *Momalan*, 26 IC 443 Mad; following, *Limba bin Krishna* v. *Rama bin Pimplu*, 15 M 15.

5 *Ram Chandra Ganga Bux* v. *Sunder Lal Singh*, 1930 PWN 455, A 1938 Pat 556, 176 IC 862, 11 RP 120, 19 PLT 916.

6 *P. Manga Rao* v. *C. Kishan Rai*, ILR 1963 AP 931.

7 *Piare Lal* v. *Baghu*, 1976 Rev LR 597.

8 *Gopal Chandra* v. *Life Insurance Corp.*, (1984) 58 Cutt LT 352.

9 *Mohammad Abdul Jubhar* v. *Lalmia*, A 1947 Nag 254.

10 *Sukya* v. *Mohd. Ishaque*, A 1950 Bom 236; compare, *Rajendra Prasad* v. *Kayastha Pathshala*, 1981 (Supp) SCC 56(1); *Noorulla Ghazmfarulla* v. *Muol. Bd.*, (1982) 1 SSC 484 (plea about constitutionality of new Act permitted).

11 *Akhi Ramayan Das Gupta* v. *B.N. Biswas*, A 1950 Cal 472.

12 *Someshwar Banerji* v. *Union of India*, 85 CLJ 364.

4. Amendment as to Parties. The question of amendment as to parties will be more conveniently discussed in Chapter XII.

Stage at which Amendment may be Allowed: O.6, R.17, permits amendment *"at any stage of the proceedings"* (*see also*, discussion under headings "Amendment and Limitation", *post*, and "Delay", *ante*).

Mere delay in moving amendment is no ground for rejecting the same where the amendment is *bonafide* and necessary for determining the real controversy involved in the suit.[13] It may be granted after the close of the case but before judgment,[14] or in the first appeal,[15] or in second appeal,[16] though only in exceptional circumstances,[17] even when it was not asked for in the trial court,[18] and even when it was allowed by the original court but the opportunity was not availed of.[19] Where, however, a defect was pointed out by the defendant in two courts, but the plaintiff did not apply for amendment, his application in the second appeal was rejected.[1] Where in the trial court the defendant objected that plaintiff could not sue in his personal capacity but must sue in a representative capacity but the palintiff persisted in the course he had adopted, permission to amend the plaint was refused by the Appellate Court.[2] In a case when it was found that the previous suit was framed in the *bonafide* belief that consequential relief was not open, amendment to include a consequential relief was allowed in spite of the fact that the defendant had taken the objection at the earliest stage that the suit offended against section 42, (old) Specific Relief Act.[3]

13 *Evelyn J. Disney* v. *Rajeshwar Nath Gupta*, A 1996 Delhi 86 (DB)).

14 *Lontfi* v. *Czarnilov Ltd.*, (1952) 2 All ER 823.

15 Section 107 (2), C.P.C.

16 Section 108, C.P.C.

17 *Mahadei* v. *Bhau*, 50 IC 180, 6 OLJ 55 DB.

18 But see, *Rameshwar* v. *Lateshwar*, 36 C 481 FB; and *Mehtab Ali* v. *Imdad Ali*, 1916 PLR 596, 30 IC 387, 1915 PWR 91, in which it was refused by Appellate Court because it was not applied for in the original court.

19 *Kishandas* v. *Rachhapa*, 33 B 644.

1 *Radhabinode* v. *Naba Kishore*, 94 IC 244, 30 CWN 4153, A 1926 Cal 578 DB; *Parvathi* v. *Sundaram*, 97 IC 127, A 1926 Mad 988; *Tejlal* v. *Godubai*, A 1944 Bom 158.

2 *Madina* v. *Ismail*, A 1940 Mad 789; *Sri Raja* v. *The Borrea Coal Co.*, A 1946 Cal 123.

3 *Gurbugappa* v. *Sahu Rammappa*, 131 IC 886, 33 BLR 141, A 1931 Bom 218.

Where a claim was grossly overvalued and this was not *bona fide*, amendment in appeal was refused.[4] In one case amendment was allowed in appeal before the Privy Council.[5] In another case of damages by a principal against his agent for acting contrary to instructions and fraudulently, the case of fraud was given up but plaintiff was allowed in appeal to introduce a new ground of relief under section 214, Contract Act by way of amendment.[6]

Amendment after close of case may be allowed (i) where the matter involved has been raised in the course of the trial and arguments addressed on it, since it will be merely incorporating in the pleadings that which has already emerged in the course of the case as an issue between the parties; or (ii) where evidence has already been led about it; but where leave is given at such a late stage the other party may be allowed to recall a witness and/or amend his pleadings.[7] But it must not be forgotten that the power is discretionary and therefore such application should generally be made with reasonable promptitude, and if possible, before the case is set down for hearing, for otherwise, it may be refused. Amendments have been refused by Appellate Courts when they changed the character of the suit and involved trial of new issues on new evidence, and the case could not be decided on the material on record,[8] and when the plaintiff had argued in the lower court that the case was properly framed and presented.[9]

An amendment at a late stage may not be allowed, when the amendment is not *bonafide* and not necessary for determining the real controversy involved in the suit.[10] When the nature of the suit is sought to

4 *Achhuta* v. *Krishna*, A 1935 Mad 879.

5 *Mohammad Zahoor Ali* v. *Ratta Koer*, 11 MIA 4 (486), *Gajadhar Mahton* v. *Ambika Prasad*, A 1925 PC 167.

6 *Philips* v. *Barnes*, 1938 MWN 156, 10 RPC 114, A 1937 PC 314, 171 IC 487 PC.

7 *Lontfi* v. *Czarnilov Ltd.*, (1952) 2 All ER 823.

8 *Mehtab Ali* v. *Imdad Ali*, 30 IC 387, 1916 PLR 596, 1916 PWR 91; *Nag Tun* v. *Nag Kna*, 12 IC 200, 4 Bur LT 244; *Bajrang* v. *Brahmadatt*, 52 IC 849, A 1923 Lah 675; *Maung Ba* v. *Ma Than*, A 1926 Rang 49, 3 Rang 383; *Dhannulal* v. *Kuldip Narain*, A 1940 Pat 88, 186 IC 852; *Fazal Bibi* v. *Abdul Rahim*, 42 PLR 479.

9 *Chhatrapat Singh* v. *Maharaja Bahadur Sindha*, 39 IC 861 Cal.

10 *Evelyn J. Disney* v. *Rajeswar Nath Gupta*, A 1996 Delhi 86 (DB).

be altered,[11] or when the amendment seems to be entirely an after thought, or when the case originally set up appears to fail, in which case prejudice to the defendant is clear or when it is open to the plaintiff to bring a fresh suit for obtaining the relief sought by the amendment,[12] or when it will enlarge the scope of the suit after it has come up by remand from the Appellate Court.[13] In a suit for redemption which was ready for judgment, the plaintiff applied stating that he had filed it in ignorance of the facts and asked to be allowed to amend the plaint so as to claim possession on the allegation that the mortgage was invalid, being without consideration and necessity. It was held that the application should in this case have been refused.[14] Similarly, in a suit contesting an adoption, plaintiff applied, after a considerable evidence had been taken, to amend the plaint so as to allege that the parties did not recognise the custom of adoption. The application was refused.[15] But where on the facts appearing from the plaintiff's evidence a new defence of law arose, the defendant was allowed to take such a defence by amending his written statement even after the close of plaintiff's evidence.[16] In a suit for specific performance of a contract defendant was not allowed, after the case had remained pending for over a year, to raise the new defence that the contract of sale was induced by misrepresentation of the plaintiff.[17]

In a suit for possession on the allegation that defendant took wrongful possession two years ago, the court found that defendant had been in long possession. The plaintiff was not allowed to amend the plaint in second appeal so as to allege that the defendant's possession before two years was permissive as that would have changed the onus from plaintiff to defendant.[18] In another case plaintiff was not allowed to amend his plaint in second appeal so as to include a prayer based on a new cause of action

11 *Askari* v. *Ratan Lal*, A 1934 Oudh 178, 148 IC 1044, 11 CWN 453; *Tipan* v. *Secretary of State*, 154 IC 103, A 1935 Pat 86.
12 *Daw Pan* v. *Ma Shwe*, A 1935 Rang 88.
13 *Mira Rani* v. *Durgabala*, (1985) 89 CWN 444.
14 *Tohlu Mal* v. *Buta*, 67 IC 132, 3 LLJ 184.
15 *Shah Deo Narayan* v. *Kusum Kumari*, 46 IC 929, 5 Pat LJ 164.
16 *Sulaiman* v. *Tan Hwi*, 7 R 800, 121 IC 803, A 1930 Rang 140.
17 *Parshottam* v. *Taimur Ali*, A 1945 All 29.
18 *Rahella* v. *Wazira*, 109 IC 320, 9 LLJ 334, A 1928 Lah 32.

which on that date had become barred by limitation.[19] In a case plaintiff based his suit on the allegation that the defendant was licensee, defendant pleaded title by adverse possession and the suit was dismissed, the court holding that the defendant was not a licensee; the plaintiff was not allowed to amend his plaint in appeal so as to base the suit on the ground that the defendant was trespasser.[20] The court disallowed an amendment asked for in Letters Patent Appeal for conversion of a suit for specific performance into one for compensation or damages.[1] In another case in which a suit for sale on the allegation that the plaintiff was usufructuary mortgagee and had been dispossessed was dismissed on the ground that the mortgage was against statue, the same High Court disallowed in second appeal an amendment to enable plaintiff to claim ownership by prescriptive right.[2] Where the plaintiff filed the suit only for an injunction restraining the defendant from alienating the property agreed to be sold to him, the plaintiff was held not entitled to ask for the relief of specific performance by way of amending the plaint after a lapse of seven years.[3] Amendment was refused in second appeal[4] when it was found that the plaintiff had made deliberately false allegations in the plaint and the suit in amended form would be barred by limitation at that stage.

In a Madras case, a sister of the deceased had challenged the adoption by the widow but compromised the case on taking a portion of the property. Several years later the sister's son brought a suit for a declaration of the invalidity of the adoption, stating that the compromise by his mother was not binding on him as it was brought about by fraud. The plaintiff's application for including a prayer for setting aside the compromise and order based on it was allowed in appeal by the High Court even after limitation on the ground that the plaintiff had mentioned all necessary facts constituting the cause of action in the plaint and therefore no new case was set up.[5] In another case the plaintiff sued his uncle for

19 *Vedagiri* v. *Ovveti*, 110 IC 775, A 1928 Mad 828.
20 *Khanu* v. *Panjal*, A 1933 Sind 279, 146 IC 777.
1 *Kubad Bai* v. *Guhi*, A 1940 Pat 92, 187 IC 198.
2 *Maksudanlal* v. *Niranjan*, A 1940 Pat 494, 187 IC 266.
3 *Raheja Constructions* v. *Alliance Ministries*, A 1995 SC 1768.
4 *Prahlad Mohanti* v. *Prahlad Chandra Nath*, A 1944 Pat 276.
5 *Krishna Ayyar* v. *Gamathi Ammal*, A 1945 Mad 33.

partition on the allegation that the latter had adopted him and on defendant's death his widow and daughter who were substituted set up a will executed by him. The plaintiff was allowed to amend the relief by claiming possession on the ground that the will was not genuine.[6] In suit for declaration plaintiff was allowed in second appeal to add a prayer for possession.[7]

In a suit for damages for libel the defendant traversed all the plaint allegations specifically except the publication which was considered to have been admitted by implication. After the issues, the defendant wanted to amend the written statement by denying the publication, but the application was disallowed, as a defendant who deliberately and under no mistake or misapprehension, admitted a fact, "cannot be allowed to change front".[8] In a similar suit for libel, the plea of privilege was not allowed to be added at the commencement of the trial, as being unfair to the plaintiff.[9] But where in a libel suit the defendant originally pleaded that the words did not bear and were not capable of bearing a meaning defamatory of the plaintiff amendment to plead truth and justification was allowed.[10]

Amendment due to Subsequent Event : Though ordinarily suits are decided with reference to the dates on which they are instituted, if events happen after the institution of the suit with reference to which the rights of parties are to be determined, amendments are allowed to enable the court to take such events into account to bring their decisions in conformity with the events as they stand on the date of the decree.[11] The court can always take notice of subsequent events to render justice and allow amendment of pleadings necessitated by subsequent events.[12] There is nothing to prevent amendment so as to base a claim on a cause of action arising after institution of the suit,[13] and where the original relief has, by

6 *Methi* v. *Bhimuder*, A 1946 Mad 497.
7 *Shankar* v. *Puttu*, A 1932 Bom 175, 34 BLR 125, 139 IC 678.
8 *L.A.Subramania* v. *R.H. Hitchcock*, 85 IC 900 Mad.
9 *Lala Lajpat Rai* v. *Englishman*, 13 CWN 895, 36 C 883.
10 *Cadam* v. *Beaverbrook Newspapers*, (1959) 1 All ER 453 CA.
11 *Shikhar Chand* v. *D.J.P. Karini Sabha*, A 1974 SC 1178; *P.Venkateswarlu* v. *Motor & General Traders*, A 1975 SC 1409; *M.Laxmi & Co.* v. *Dr. Anant Deshpande*, A 1973 SC 171.
12 *Annoo Shetty* v. *Aishabai Hamid Khan*, 1995 AIHC 1893 (Bom.); *M.C.Mehta* v *Union of India*, A 1987 SC 1086.
13 *Nur Khatun* v. *Sumar Sawayo*, 31 IC 7, 9 SLR 61; *Mumtaz* v. *Naurang*, 3 LLJ 227;

change of circumstances, become inappropriate, or it is necessary to have a decision of the court on the altered circumstances in order to shorten litigation or to do complete justice between the parties, a plaint may be allowed to be amended so as to base a claim on events happening after the institution of the suit.[14] For example, if pending a suit for declaration the defendant takes possession,[15] or plaintiff becomes entitled to possession, by death of one of the defendants,[16] a plaintiff may amend the plaint by adding a prayer for possession instead of bringing another suit, or if, pending a suit for partition by a plaintiff against his two brothers, one of the brothers dies, the plaintiff can amend his plaint and claim a half share instead of one-third. So, where a suit for declaration of invalidity of a widow's transfer was dismissed on the ground of limitation and the widow died pending appeal, the Appellate Court allowed the plaintiff to convert his suit into one for possession.[17] So, where money became payable immediately after the suit and the defence was that the suit was premature, a decree was passed without amendment.[18]

In a case it was found that the plaintiff had no title on the date of suit, but one accrued to him during the pendency of the suit, he was allowed to amend the plaint.[19] So, when a plaintiff sued for redemption of a mortgage made by a Hindu widow on the allegation that he was her adopted son, and when the adoption was questioned by the mortgagee, he obtained a conveyance of the equity of redemption from the reversionary heir, he was allowed to amend the plaint by setting up this new title, as the suit was still within time and there was no prejudice to the defendant.[20] Similarly,

Ghulam Fatima v. *Rahman*, 50 IC 270, 127 PR 1919; *Tara Chand* v. *Abdul Ahad*, 67 IC 894 Lah; *Allahabad Theatres* v. *Kusum*, 1974 ALJ 196, A 1974 All 73.

14 *Nurmian* v. *Ambica*, 44 C 97; *Ramshivar Dayal* v. *Pacham Kumar*, A 1970 Raj 77; *Ayesha Khatom* v. *Durga Sahaya*, A 1977 Cal 108.

15 *Hamid Mirza* v. *Ahmad Mirza*, 9 OLJ 359, A 1922 Oudh 266 DB.

16 *Roshana Singh* v. *Durag Singh*, 124 IC 244 Nag.

17 *Sreeramulu* v. *Hanumayya*, A 1930 Mad 47.

18 *Subbaraya* v. *Nachiar*, 1918 MWN 199, 44 IC 863, 7 LW 403; *Kanshiram* v. *Jaimal*, 75 IC 562; *S.K Nagoor* v. *Haji*, 4 Bur LJ 110, A 1925 Rang 264; *Vadhah* v. *Doddi*, 93 IC 955, A 1926 Mad 377, 1926 MWN 9; contra *Jugal Kishore* v. *Chari & Co.*, 101 IC 643, 25 ALJ 385.

19 *Pendekkallu* v. *Pendekkallu*, 75 IC 112 Mad; A 1977 Cal 409.

20 *Dorasami* v. *Chinnia*, 22 MLT 538, 1918 MWN 89, 34 MLJ 258, 43 IC 560, 7 LW 335.

when plaintiff sued for a declaration that he was entitled to an office of a temple according to turns, and the year for which he was entitled to possession expired during the pendency of the suit and another year for which he became entitled ensued, the plaintiff was allowed amendment so as to get possession during such latter year.[1] Suit for possession of leased property on eviction of tenant on the ground of forfeiture can be amended by adding a new ground for determination of lease by efflux of time.[2] Ejectment suit on ground of default in payment of rent can be got amended by introducing an allegation of sub-letting which took place during the pendency of suit.[3] But an amendment of this nature cannot be allowed where it may amount to a change of jurisdiction, or there is great delay in making the application, or if a fresh inquiry into other facts becomes necessary,[4] nor can an amendment be allowed to introduce a cause of action which arose during the pendency of the suit when the effect will be to alter the nature of the suit.[5]

A cause of action cannot, however, in any case arise from the suit itself, e.g. in a suit for ejectment, a disclaimer of the landlord's title in the defendant's pleading cannot give a cause of action for that suit.[6] In a Hindu husband's petition for restitution of conjugal rights, which was filed within two years of the date of marriage, the wife counter with a plea for judicial separation. Three years thereafter the plaintiff applied for leave to amend the petition with a view to praying for divorce on the ground for continuous desertion for over two years including the duration of the petition. The trial court allowed it on the ground that the wife herself had asked for judicial separation. The High Court on revision reversed the order and held that as an amendment related back to the date of institution of the petition or suit, the petition if amended into one for divorce will be barred as premature;

1 *Lakshmiah* v. *Krishnaswami*, 1935 MWN 56, A 1935 Mad 286, 41 LW 429.

2 *Tinkan Das* v. *Jamuna Das*, A 1973 Cal 448.

3 *Lakhmichand Kasliwal* v. *Gopaldas Nikhera*, A 1978 MP 171; *Pronati Mitra* v. *Sachindra Nath Chatterji*, A 1977 Cal 409; *Bhanu Prakash Agarwal* v. *Munna Lal*, A 1979 MP 157.

4 *Valluru* v. *Sasapu*, A 1926 Mad 6, 90 IC 881 DB; *Roshan Singh* v. *Durag Singh*, 124 IC 244 Nag.

5 *Sobhraj* v. *F.O. Variomati*, A 1942 Sind 4.

6 *Balkaran* v. *Gangadin*, 36 A 370; *Gulranmal* v. *Panna Mal*, 8 SLR 69; *Bishesar* v. *Gobind*, 12 ALJ 833; *Mir Haidar* v. *Jai Karan*, 122 IC 271.

in case of a cause of action arising subsequent to the suit a fresh suit should be filed.[7] *Also see* discussion under heading "Subsequent Events" in Chapter VIII, *ante* Variance between Pleading and Proof.

Amendment and Limitation : An application for amendment of pleading is not governed by any law of limitation. When an amendment is allowed, the suit cannot be considered to have been brought on the date of the amendment and the date of institution will be the determining factor for the purpose of limitation. In other words, such amendment relates back to the date of the suit as originally instituted. The courts are therefore reluctant to allow amendments which will take away a valid defence acquired under the Law of Limitation. It would annihilate the defendant's legal right which has accrued to him by lapse of time.[8] As a general rule, amendments ought not to be allowed when they would prejudice the rights of the other parties as existing on the date of such amendments.[9] The plaintiff will not be allowed to amend his plaint by introducing a new cause of action which, since the date of plaint, had become barred by limitation.[10] Thus, when the plaintiff in a suit for possession as reversioner of the last male owner, after limitation sought to claim the property as the nearest heir of the widow stating that the property was her stridhana, the amendment was not allowed.[11] Where in a suit for pre-emption the plaintiff deliberately omitted to include some properties, he was not allowed to include those properties, after limitation.[12] An amendment to introduce

7 *Vidya* v. *Subhash Reddy*, (1984) 2 An WR 426, relying on *A.K. Gupta & Sons* v. *Damodar Valley Corporation*, A 1967 SC 96; distinguished, *Subramaniam* v. *Sundaram*, A 1963 Mad 217 (FB).

8 *Sarandas* v. *Ameer*, 47 IA 255, A 1921 PC 50.

9 *Veldon* v. *Neal*, A 1887 (19) QBD 394.

10 *L.A. Leach & Co* v. *Jeordine Skinner & Co.*, A 1957 SC 357; *Ganpat Singh* v. *Sher Bahadur*, A 1978 All 66; *Ram Dev* v. *Ram Bahadur*, A 1984 All 206; *Parannath* v. *Madhu*, 13 C 96; *Vithu* v. *Dhondi*, 15 B 407; *Ambabai* v. *Bhau*, 20 B 759; *Gulzar* v. *Kalyan*, 15 A 399; *Macleod & Co.* v. *Ivan Jones, A* 1926 Cal 189, 87 IC 218; *Ram Karan* v. *Baldeo*, A 1938 Pat 44, 173 IC 292; *Harish Chandra Bajpai* v. *Triloki Singh* A 1957 SC 444; *Ram Dayal* v. *Brij Raj Singh*, A 1970 SC 110; *Dr. Sarojini Pradhan* v. *Karrode Chandra Pradhan*, (1973) 39 CLT 330, A 1973 Ori 214; *Harrier* v. *Ashford*, (1950) 1 All ER 427 CA; *Sant Ram* v. *Civil Judge*, A 1994 All 99.

11 *Vridhilingam* v. *Kandaswami*, 132 IC 311, A 1931 Mad 1, 60 MLJ 713.

12 *Sheo Narayan* v. *Ram Khilarawan*, A 1945 Oudh 135; *Bande Singh Ganga Singh* v. *Harbhajan Kaur*, A 1974 P & H 247.

a new cause of action inconsistent to the original case cannot be allowed after the expiry of limitation.[13]

But it is only if the lapse of time barred remedy on a newly constituted cause of action or a newly claimed relief that courts should ordinarily refuse to permit amendment of pleadings.[14] The rule that leave to amend should ordinarily be refused when its effect is to take away from a party a legal right accrued to him can apply only when either fresh allegations are added or fresh reliefs are sought. When an amendment merely clarifies an existing pleading and does not add to or alter it, the bar of limitation is not to be considered in allowing it.[15] Similarly, where the amendment does not constitute the addition of a new cause of action or raise a different case but amounts merely to a different or additional approach to the same facts, the amendment has to be allowed even after the expiry of the statutory period of limitation.[16]

In some cases, it has been held that the amendment stating a new cause of action or claiming a new relief takes effect not from the date of the suit as originally filed but from the date when the claim for amendment was made; where a suit for possession of certain plots of land is subsequently amended by the inclusion of certain other plots, it is not a case of amendment properly so called, but a case of addition of entirely new lands and as regards such lands the suit will date only from the day when the claim was made in respect thereof.[17] Where the relief was amended to a claim for new properties, the date of application for amendment was held to be taken from the date on which the new relief was claimed.[18] It may also be pointed out that it is always open to the defendants to raise a plea of limitation even after a plaint is amended and such a plea cannot be ignored merely because the amendment has been

13 *Hall* v. *Marick*, 1957 (2) All Eng.Rep 722(CA); *Mohd. Ishaq* v. *Mohd. Iqbal*, A 1978 SC 798; *Haridas Thadani* v. *Godrej* A 1983 SC 319; *Ishwar Deo* v. *State of Madhya Pradesh*, 1979 (4) SCC 163; *Babulal* v. *Hazarilal*, A 1982 SC 818; *Radhika Devi* v. *Bajrangi Singh*, A 1996 SC 2358.

14 *Ganesh Trading Co.* v. *Modhiram*, A 1978 SC 484.

15 *Laxmidas* v. *Nanabhai*, A 1964 SC 11.

16 *A.K.Gupta & Sons Ltd.* v. *Damodar Valley Corporation*, A 1967 SC 96; *Vineet Kumar* v. *Mangal Sain*, A 1985. SC 817.

17 *Gram Panchayat Deh Manzil* v. *Kesho Narain*, A 1964 Punj 462.

18 *Ramachandran* v. *Lakshminarayanaswami*, 1976 (2) MLJ 107

allowed.[19] But the rule that the amendment, which takes away the right, accrued to the defendant by efflux of time should not be allowed is not an invariable or imperative rule. This is a factor to be taken into account by the court in the exercise of its discretion and does not affect the power of the court to order amendment, if that is required in the interest of justice.[20] The Court's power is not circumscribed by the law of limitation, if in its opinion the amendment should otherwise be allowed.[21] Lord Buckmaster, observed 'that there was full power to make the amendment cannot be disputed and then such a power should not, as a rule, be exercised where its effect is to take away from a defendant a legal right which has accrued to him by lapse of time, yet there are cases where such considerations are outweighed by special circumstances of the case'. [1]

A plaintiff filed a suit for declaration of his right of pre-emption without asking for the consequential relief of pre-emption and possession. It was held that the plaintiff was attempting to assert the right which he undoubtedly possessed but through some clumsy blundering in a form which the statute did not permit and the plaint should in similar circumstances be allowed to be amended by adding the relief of pre-emption and possession even though at the time of the amendment a fresh suit would be barred by time. In exceptional cases, therefore, an amendment may be allowed even if the effect is to take away from the defendant a legal right accrued to him by the lapse of time.[2]

Formal amendments by correcting the description of the property or of the defendants or correcting any defect in signature or verification or furnishing particulars, can however, be always made even after the period of limitation has expired. [3] Thus, a suit in a firm's name was allowed to be

19 *Gordhandas* v. *Gokal Khatoo*, 96 IC 79, A 1926 Sind 246.

20 *Leach & Co* v. *Jordan Skinner & Co.* A 1957 SC 357; *Pirgonda* v. *Kalgonda*, A 1957 SC 363.

21 *Bishweswar* v. *Jaileshan*, A 1968 Cal 213.

1 *Charandas* v. *Amirkhan*, A 1921 PC 50.

2 *Shanti* v. Holmes, A 1974 SC 1719; *Laxmidas* v. *Nanabhai*, A 1964 SC 11; *Corporation of Calcutta* v. *Radre*, A 1952 Cal 222; *Rajendra* v. *Saraswathi Press Ltd*, A 1952 Cal 78; *Leach & Co* v. *Jordin Skinner & Co.*, A 1957 SC 357; *Anandibhai* v. *Surendara Bai*, A 1965 M P 86; *Pirgonda* v. *Kalgonda*, A 1957 SC 363; *Shik Murugunu* v. *Yaala*, 1956 Andhra WR 93.

3 *Jothiraj* v. *Bas deo*, 8 ALJ 817; *Nanabhai* v. *Popat Lal*, 34 VLR 628, 138 IC 797, A 1932 Bom 367; *Ramnath* v. *Mohan Lal*, 181 IC 106.

changed in the Manager's personal name beyond limitation.[4] Amendment by adding the name of the defendant, describing him as a shebait of the deity as a real necessary party was allowed.[5]

(*See* also discussion under the heading "*delay*" and "*Stage at which amendment may be allowed*" ante).

How is Amendment Made : In cases in which the court orders an amendment either on the application of the opposite party, or of its own motion, either under O.6, R.16, or under the second sentence of O.6, R. 17, it ordinarily causes the amendment to be made in the pleading by one of its officers, under the signature of the presiding judge. When a party obtains leave to amend his own pleading under O.6, R. 17, he should, after leave has been granted, generally make the amendment himself in court, but, in proper cases, e.g. when the party is a *pardanashin* lady and the amendment requires her signature or verification, the court may return the pleading to her pleader for amendment within a fixed time.

When a plaint is amended, the court should normally give an opportunity to the defendant to file an additional written statement, and if new issues arise, an opportunity to the parties to adduce evidence on those new issues. Similarly, when a written statement is allowed to be amended and a new plea is added, the plaintiff should have opportunity to meet the new plea.[6] But if the amendment is of a purely formal nature it should not give the other party an opportunity to reopen his case by introducing new pleas.[7] When an amendment is ordered by the Appellate Court, necessitating new issues and new evidence, the Appellate Court will generally remand the case[8] to the lower court for carrying out the amendment and re-trying the case, though it can have the amendment made in its own court, if it so chooses.[9]

Terms on which Amendment is Allowed : Amendment is allowed on "such terms as may be just". Payment of costs is generally one

4 *Jai Jai Ram Manohar Lal* v. *National Building Material Supply*, A 1969 SC 1267.

5 *Sri Gowri Shankar* v. *Mangal Maheton*, A 1940 Pat 440.

6 *Tadiparti* v. *Maddukuri*, 24 IC 822; *Prasapathi* v. *Raja Vachavaji*, 29 MLJ 53.

7 *Ganba* v. *Ganpatrao*, A 1937 Nag 376.

8 *Uzir* v. *Saivai* 20 CWN 54.

9 *Nipendranath* v. *Hemanta*, 63 IC 701 Cal.

condition on which amendment is allowed, which means costs of the application and of any adjournment caused thereby, or on account of the amendment, and also the costs of any evidence or pleading rendered nugatory by the amendment.[10] Costs incurred by the opponents upto the date of amendment may in proper cases be ordered to be paid.[11] A party accepting the costs without demur, but not if he accepts under protest,[12] is estopped from challenging the order of amendement.[13]

The principal of estoppel which precludes a party from assailing an order allowing amendment subject to payment of costs where the other party has accepted the costs in pursuance of the said order applies only in those cases where the order is in the nature of a conditional order and payment of costs is a condition precedent to the amendment being allowed. In such a case it is open to the party not to accept the benefit of cost and thus avoid the consequence of being deprived of the right to challenge the order on merits. The said principal would not apply to a case where the direction for payment of costs is not a condition on which the amendment is allowed and costs have been awarded independently in exercise of the discretionary power of the court to award costs because in such a case the party who has been awarded costs has no opportunity to waive his right to question the validity or correctness of the order.[14] Other terms, besides or instead of costs, can also be imposed as a condition of grant of leave to amend the pleading; such as that the opponent will also have the opportunity of applying for consequential amendment of his pleading and to lead additional evidence to meet the new plea or to support his own amended pleading.

Failure to Amend After Leave : When a party obtains leave to amend his pleading, he must amend it within such time as is allowed by the court when giving leave to amend. The court has, however, power to

10 In re *Truefort*, 53 LT 498.

11 *Jacobs* v. *Schmalz*, (1890) 62 LT 121.

12 *Shri Ram Sundermal* v. *Gouri Shanker*, A 1961 Bom 137.

13 *District Council of Wardha* v. *Anna*, 197 IC 76, A 1941 Nag 273; *Kannalal* v. *Bhagwandas*, A 1949 Nag 5; *Korvati Subbamma* v. *Pinna Pureddy*, A 1958 AP 483; *Ramcharan Mahto* v. *Custodian*, A 1964 Pat 275.

14 *Brijendra Nath Srivastava* v. *Mayank Srivastva*, A 1994 SC 2562; See also *Cudise Trinath Rao* v. *Sudhansu Prasad*, A 1992 Orissa 168.

extend the time. If the party obtaining leave to amend his pleading fails to amend it within such time, he shall not be permitted to amend it afterwards, unless he can obtain an extension of time from the court.[15]

The consequence of failure to amend the pleading, thus is that the case will go to trial on the original pleading, but the suit cannot be dismissed, nor can such original pleading be rejected or struck out simply on the ground of failure of a party to amend it within the time allowed to him.[16] A court has no power to compel a plaintiff to amend his plaint. If a plaintiff does not ask for leave to amend a defective plaint, and if the court finds that the suit cannot proceed on the plaint, it can dismiss the suit.[17] In a case the application for amendment was read as part of the plaint and as the defendant did not raise any objection to this in the beginning, the objection was considered as waived.[18]

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15 O. 6, R. 18.

16 *Rahmatulla* v. *Karimu*, 20 Lah LT 145; *Murlidhar* v. *Narain Das*, 19 IC 472, 1913 PLR 169, 1912 PWR 107; *Feroz Shah* v. *Kalu Ram*, 164 IC 181, A 1936 Pesh 155.

17 *Ujagar* v. *Ram Ditta*, 111 IC 787 Lah; In Re *Langton*, (1960) 1 All ER 657 CA.

18 *Gaj Kumar Chand* v. *Lachman Ram*, 10 IC 503, 14 CLR 627.

Chapter XI

FRAME OF SUIT

Before drafting a plaint, a pleader should carefully consider how he should frame his suit. The first thing which he has particularly to consider is the cause of action for the suit which he is going to institute. If there is a single cause of action and more than one relief can be prayed for, he should pray for all of them, and, if he relinquishes any, he must be prepared to do that once for all. If there are several causes of action, he must apply his mind to consider whether he can bring a joint suit in respect of all of them or must bring separate suits. He has also to consider how best he can frame his suit, so that it may not offend against the rules contained in O.1 and O.2, and may at the same time save his client from unnecessary future litigation. Then, he has to consider what persons he must implead as defendants and whom he cannot legally implead. If there are several plaintiffs, he has to consider whether they can all sue jointly or not. He should not leave out any person who is a necessary or a proper defendant. If he does so, the suit would not be properly framed.

First Principle : The first principle to be remembered in framing a suit is that, as far as practicable, it should be so framed as to afford ground for final decision of the "subjects in dispute" and to prevent further litigation concerning them.[1] This is done by bringing forward the whole case as to the matter of litigation or the question of right involved in the suit, as the words "*Subjects in dispute*" in O.2, R.1, do not mean the *corpus* or subject matter of the claim, but they mean the "jural relation between the parties to the suit for the determination of which the suit is brought".[2] It is not, therefore, intended that a plaintiff should necessarily unite all the causes of action which he may have against the defendant in respect of the *corpus* of the suit, though, of course, he is at liberty to do so, if he likes.[3] If a plaintiff can claim a property on more than one separate ground, he should allege all those grounds in the plaint, and, if he does not, the dismissal of his suit on the ground or grounds urged will bar a separate suit on the

1 O.2, R.1.

2 *Ramaswami* v. *Vythinatha*, 26 M 760 (766); *Shanker Lal* v. *Ganga Bisan*, A 1972 Bom 326.

3 *U. Po Ko* v. *U. Po Thein*, 161 IC 820, A 1936 Rang 167.

other grounds (section 11, explanation IV, C.P.C.) Thus, where a suit for possession as reversioner on the ground of a certain relationship was dismissed, a subsequent suit for possession as reversioner on the ground of another relationship was held barred[4] as the plaintiff was bound to include in the former suit all the different grounds on which he claimed to be a reversionary heir.

Second Principle: The second principle embodied in O.2, R.2, is directed against splitting up of a cause of action. The object of this rule is that a defendant should not be dragged to court unnecessarily and that there may not be multiplicity of suits. It requires that every suit shall include the whole of the claim which a plaintiff is entitled to make in respect of an action[5] but it is not necessary that he should include in one suit every claim or every cause of action which a plaintiff might have against the defendant[6] even where more claims than one arise in respect of the same subject matter.[7] O.2, R.2 requires that a party who comes to the Court, must plead all the grounds available to it and seek all the reliefs which it can seek in the first case itself, so that the Court may decide the case once for all. The principle is based on public policy and cannot be taken exception otherwise.[8] O.2, R.2 requires the plaintiff to claim all reliefs emanating from the same cause of action.[9] Though a suit not so framed is not liable to be dismissed but the plaintiff shall not be at liberty to bring another suit for the portion so omitted or relinquished in the first suit. Thus the omission will bar only the remedy of the plaintiff and not his right.[10] It is immaterial for the application of this penalty whether the omission was intentional or accidental,[11] or that after having omitted to include it by

4 *Masilamania* v. *Thiruvengadam*, 31 M 485.

5 O.2, R.2.

6 *Kulada Pd.* v. *Khudiram*, 70 IC 187, 27 CWN 678, 37 CLJ 545; *Manmathanath* v. *Jagat Ram*, 59 IC 517 Cal; *Parashram* v. *Sadasheo*, A 1936 Nag 268; *Gulzar Khan* v. *Gram Panchayat Bora Kalan*, 1989 Punj LJ 176 (P&H) (DB).

7 *Rengier* v. *Ramia*, A 1930 Mad 264; *Shanker Lal* v. *Ganga Bisan*, A 1972 Bom 326; *Nav Samaj Ltd.* v. *Shamrao*, A 1984 Bom 23.

8 *Swatantra Kumar Agarwal* v. *Managing Director, U.P.F.C. Kanpur*, A 1994 All 187.

9 *Inacio Martins* v. *Narayan Hari Nain*, A 1993 SC 1756; *H.Basha* v. *Urdu Primary School Bangalore*, 1995 (2) Kar LJ 495 (Kant).

10 *Punjab National Bank* v. *Official Receiver*, 188 IC 833, A 1940 Lah 166; *Ahmad Jaman Khan* v. *Baldeo Das*, A 1933 All 228.

11 *Buzloor Ruheem* v. *Shumsoonnissa*, 11 MIA 551; *Syed Abdulla* v. *Harkishore*

seeking amendment of the plaint.[12] The omission will not bar second suit when the plaintiff was not, at the time of the former suit, aware of his right to the claim omitted by him,[13] or where the cause of action for the subsequent suit has arisen subsequently.[14] Nor will the rule be attracted when the cause of action has been split by agreement between the parties.[15] A subsequent suit in respect of a claim, which was barred by time, when the earlier suit was filed, but became within time later on by an Act, will not be hit by O.2, R.2.[16] It is, therefore, necessary for a pleader to carefully consider the whole claim which his client can make in respect of a cause of action before drafting the plaint, and unless the plaintiff elects to relinquish any portion of it, to advance whole of it in his plaint. For this purpose it is necessary to understand what the term "cause of action" exactly means. The mere fact that the buildings let out to tenants are under a roof, which covers a number of rooms under it, does not justify a joint trial.[17]

Thus, where a person unauthorisedly occupies different khasra numbers, the owner may file several suits on the same day or on different dates within the limitation period. He may file one suit also.[18] The provisions of O.2, R.2, do not bar a subsequent suit when the earlier suit has been dismissed on technical ground.[19] O.2, R.2 is based on the rule of law that a man shall not be twice vexed for one and the same cause.[20] Where the

Singh, 2 CLR 490; *Ram Prasad* v. *Radha Pande*, 21 PLT 790; *Shukla Verma* v. *Prem Shanker*, 1976 ALJ 652.

12 *Mohammad Khalil* v. *Mahbubali*, A 1949 PC 78, 1948 ALJ 574.

13 *Amanat Bibi* v. *Imdad Husain*, 15 C 800 (PC); *Batual Kuwar* v. *Munni Lal*, 32 A 625, 7 ALJ 734; *Gora Chand* v. *Basanta*, 15 CLJ 238; *Dasarthy* v. *Palala*, 45 IC 969, 24 MLT 311; 7 LW 557, 1918 MWN 427; *Yarlagada* v. *Pulgadda*, 103 IC 74 (Mad); *Venkatachandikamba* v. *Viswanadhammaya*, 164 IC 717, A 1936 Mad 699; *Bhagwan Das* v. *Tajunnisa*, A 1941 All 217, 194 IC 586; *State of Madhya Pradesh* v. *State of Maharashtra*, (1977) 2 SCC 288, (1977) 2 SCR 555, A 1977 SC 1466; *Nav Samaj Ltd.* v. *Shamrao*, A 1984 Bom 23.

14 *Geeta Bose* v. *Machine Tools of India Ltd.*, A 1992 Cal 116 (DB); *State of M.P.* v. *State of Maharashtra*, A 1977 SC 1466.

15 *Phool Chand* v. *Kamta Pd.*, 1963 All WR 619.

16 *National Security Assurance Co.* v. *S.N.Jaggi*, A 1971 All 421.

17 *Ebrahim Ismail Kunju* v. *Phasila Beevi*, A 1991 Ker 385 (DB).

18 *Gulzar Khan* v. *Gram Panchayat, Bora Kalan*, 1989 Punj LJ 176 (P & H) (DB).

19 *Inacio Martins* v. *Narayan Hari Naik*, A 1993 SC 1756.

20 *Balmukund* v. *Sangari*, 19 All 379 (FB); *Mangaraju* v. *Venugopala*, A 1964 AP 412.

earlier suit was for enforcement of bank guarantee while the second suit was for recovery of damages for the breach of the underlying contract, the subsequent suit was held not barred by the provisions of O.2, R.2.[1]

What is Cause of Action : The Privy Council summarised the law on the point as follows:

" (1) The correct test in case falling under O.2, R.2, is Whether the claim in the new suit is in fact founded upon a cause of action distinct from that which was the foundation for the former suit.

(2) The cause of action means every fact which will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment.

(3) If the evidence to support the two claims is different, then the causes of action are also different.

(4) The causes of action in the two suits may be considered to be the same if in substance they are identical.

(5) The cause of action has no relation whatsoever to the defence that may be set up by the defendant nor does it depend upon the character of the relief prayed for by the plaintiff. It refers to the *media* upon which the plaintiff asks the court to arrive at a conclusion in his favour."[2]

Every such fact or circumstance which entitle the plaintiff to the relief claimed is a part of the "cause of action",[3] but the term does not include every piece of evidence which is necessary to prove such fact.[4] It must be carefully distinguished from the transaction which gave rise to it, for the same transaction may give rise to several causes of action and the law does not require that *all* such causes of action must be joined in one suit.[5]

1 *State of Maharashtra* v. *National Construction Co.*, (1996) 1 SCC 735.

2 *Mohammad Khalil* v. *Mahbub Ali*, A 1949 PC 78; see also, *Sidramppa* v. *Rajashetty*, A 1970 SC 1059; *Haridas* v. *Anath Nath*, A 1961 SC 1419; *Pratap Chand* v. *Ram Narayan*, (1961) 3 SCR 913, (1962) 1 SCJ 158; *Gurbux Singh* v. *Bhooralal*, A 1964 SC 1810; *Shankar Sita Ram* v. *Balkrishna*, A 1954 SC 352; *State of M.P.* v. *State of Maharashtra*, A 1977 SC 1466, (1977) 2 SCR 555; *Oskar Louis* v. *K.V. Saradha*, A 1991 Ker 137; *Jokhi Ram* v. *Sardar Singh*, 1955 ALJ 579.

3 *Beni Madho* v. *Sarat Chandra*, A 1937 Cal 643.

4 *Sheokumar* v. *Bechan Singh*, A 1940 Pat 76.

5 *Shridhar* v. *Godulal*, 41 BLR 1223, A 1940 Bom 20, 186 IC 609; *Amar Singh* v. *Tulsi Ram*, A 1949 Nag 195; *Arunachalam Pilai* v. *Vellamma*, (1967) 2 MLJ 490.

For example, by a collision with the defendant's van, the plaintiff's cab is damaged and the plaintiff also receives bodily injuries. Though the transaction (viz., the collision) is one, two causes of action have accrued to the plaintiff, viz., (1) damage to his cab, and (2) injury to his body. He is not bound to join both of them in one suit (though he is at liberty to do so, if he likes) and the suit for compensation for damage to the cab will not bar a second suit for damage for bodily injury. But the plaintiff cannot be permitted to bring one suit in respect of damage to the wheels of his cab and another in respect of damage to the axle, or one suit for injury to hands and another suit for injury to legs. One and the same transaction may give rise to several distinct causes of action and plaintiff may bring as many separate suits as there are causes of action, but not more than one suit can be brought in respect of a single cause of action. The test is to inquire, after setting out the facts constituting the cause of action for the particular claim, whether on those facts it is open to the plaintiff to make any other claim, and whether the facts which would be required to establish the claim to be preferred would as well substantiate another claim.[6] If the answer is in the affirmative, the pleader should warn the plaintiff of his right and of the consequence of the omission.

Illustrations : (1) Of the Same Cause of Action : *The following claims have been held to arise from the same cause of action :* The plaintiff sent one consignment of *bidies* through Railways. A part of the consignment was not delivered, while a part was delivered in damaged condition. A suit was brought for damaged goods. Subsequent suit for non-delivery was held barred by O.2, R.2. It was treated as intentional relinquishment of claim.[7] Suit for specific performance, subsequent suit for recovery of deposit money.[8] Suit for specific performance of contract, subsequent suit for compensation or for even *mesne* profits.[9] Previous suit for termination of agency, second suit for rendition of accounts.[10] Suit

6 *Mohammad Khalil* v. *Mahbub Ali*, A 1949 PC 78; *Sardar Balbir Singh* v. *Atma Ram Srivastava*, A 1977 All 211 (FB); *Aziz Fatima* v. *Munshi Khan*, A 1980 All 277.

7 *Chotabhai Jethabhai & Co.* v. *Union of India*, A 1971 Cal 221.

8 *Chindamabaro* v. *Sri Niwas*, 8 MLJ 6.

9 *Pratap Chandra* v. *Kalicharan*, A 1963 Cal 468.

10 *State* v. *Algarisubramanian*, A 1988 Mad 248.

for specific performance, suit for money paid on a consideration which has failed.[11] Suit for partition basing title to half share, subsequent suit for possession of entire property.[12] Where in a claim petition arising out of termination of contract, certain issues are not raised, a second claim petition founded on those very issues.[13] Suit for partition of joint family property and subsequent suit for partition of an item omitted in the former suit.[14]

Upon settlement of accounts between the parties the defendants gave the plaintiff an order from their agents for payment of Rs. 2,500 and promised to pay the balance within a month. Claims of both arise out of the same cause of action and only one suit should be brought.[15] Where a contract of sale of goods was broken by the defendant, in part by refusal to take delivery, and in part by refusing to pay the price of goods delivered, it was held that there was only one cause of action for both.[16] Claim for interest on the date the principal has also become due, subsequent claim for principal.[17] However, where the earlier and subsequent suits would lie in different courts e.g., Small Cause Court and Civil Court,[18] or Civil Court and Revenue Court,[19] then separate suits for mesne profits, declaration and possession would not be barred.

Suit for maintenance, and subsequent suit for the same by enforcement of a charge on property even though the court deciding the first suit could not give relief claimed in the second suit.[20] Where a sale-deed was executed by the defendant in favour of the plaintiff and the consideration was made

11 *Parangodan* v. *Perumtoduka*, 27 M 380; *Venkatarama* v. *Vemkata*, 24 M 27.

12 *Ma Pwa Shin* v. *U Po Sin*, A 1937 Rang 324, 170 IC 946.

13 *G.V. George* v. *Secy. to Government, Water and Power Deptt. Trivandrum*, A 1990 SC 53.

14 *Nageshwar Tewari* v. *Dwarka Prasad*, A 1953 All 541.

15 *Appaswami* v. *Ramaswami*, 9 Mad 279.

16 *Duncan Brothers* v. *Jeet Mal*, 19 C 372.

17 *Muhammad Hafiz* v. *Mirza Mohammad Zakarya*, 20 ALJ 17, 44 A 121, 65 IC 79, 49 IA 9, 42 MLJ 248, 35 CLJ 126, 1 PWR 1922 (PC); *Chunilal* v. *Amir Ahamad*, A 1958 AP 608; *Thirumalai Nambi* v. *Maharaja Pillai*, (1976) 2 MLJ 55.

18 *Aziz Fatima* v. *Munshi Khan*, A 1980 All 270.

19 *Maharaj Singh* v. *Board of Revenue*, 1981 All CJ 191.

20 *Manubothula Rama Rao* v. *Munubothula Venkayamma*, A 1931 Mad 705 , 134 IC 803, 1931 MWN 893; *Jawala Prasad* v. *Padmavati*, 167 IC 123, 1936 AWR 1096, A 1937 All 56.

up of two old mortgage deeds and some cash, and the plaintiff on the cancellation of the sale-deed, brought a suit for refund of the cash only, his subsequent suit on the basis of one of the mortgage deeds was held barred by O. 2, R. 21.[1] One transaction of mortgage and lease, suit for rent, subsequent suit for mortgage is barred.[2] Suit for whole amount as heir of plaintiff's father decreed for half as other half held to be of mother, subsequent suit for other half on ground that mother had life interest only held barred.[3] Suit against order of dismissal from service, subsequent suit for arrears of salary was not maintainable.[4] First suit for declaration that sale deed is invalid without claiming reliefs of possession and mesne profits and without obtaining leave of court for the omission would debar the plaintiff from filing a subsequent suit for possession and mesne profits.[5] Where in the earlier suit, the plaintiff claimed recovery of possession on the ground that the defendant was licensee, the second suit on the ground that the defendant was a trespasser was held barred.[6] Where the bank to which a property is hypothecated filed a suit for a simple money decree, any later claim on the security or sale proceeds thereof was barred.[7]

(2) Of Distinct Causes of Action : *The following are instances of claims having been held to arise from distinct cause of action:* Claim on a promissory note; claim on the basis of original consideration after the promissory note was held to be unenforceable on account of material alterations,[8] or the promissory note was not proved.[9] Claim by a reversioner to challenge the validity of one alienation by a Hindu widow; similar suit in respect of another alienation.[10] Suit for a specific sum of

1 *Kamaruddinshah* v. *Sheikh Diljan*, 166 IC 996, A 1937 Cal 57.
2 *Md. Ahsanul Tuadid* v. *Akhtar Hasan*, A 1960 Pat 106; contra, *Venkappa* v. *Gangadhar Dharn*, A 1959 JK 112.
3 *Dip Chand* v. *Ramlal*, A 1961 Punjab 322.
4 *P.J. Saitins* v. *Superintendant Printing and Stationery*, 1965 ALJ 292; *Angal* v. *State of Maharashtra*, A 1968 Bom 304; *Union of India* v. *P.V. Jagannath*, A 1968 MP 204.
5 *Gnanaprakasam* v. *Sabasthi*, (1980) 1 MLJ 182.
6 *Indubai* v. *Jawaharalal*, A 1990 MP 80.
7 *Syndicate Bank* v. *Official Liquidator*, A 1995 Del 256.
8 *Saninath* v. *Palanaiapa*, 25 IC 228, 18 CWN 617.
9 *M.K.M.V. Chetty* v. *Ma Mya*, 94 IC 628, 1925 Rang 304, 4 Bur LJ 130.
10 *Bahadur Singh* v. *Sultan*, 8 OLJ 535, 66 IC 455, 3 UPLR (PC) 83.

money as money had and received for plaintiff's use; suit for account and payment of sum found due.[11] Suit for damages for failure to do repairs to a car; suit for its price on account of defendant's refusal to return.[12] Suit for account upon a mortgage; suit for redemption.[13] Suit for dissolution of partnership; suit for account.[14] Suit for ejectment on the ground of sub-letting subsequent suit on the ground of bonafide requirement.[15] Suit on two bonds, though they have been executed in lieu of one original consideration,[16] but in a case in which the defendant, in consideration of his liability for Rs. 1,300, passed a promissory note for Rs. 700 and agreed to do certain legal work for the balance of Rs. 600, but died before doing the legal work, it was held that there was a single cause of action for money due on the promissory note as well as for recovery of Rs. 600 and separate suits could not be brought.[17] Suit for rent against a mortgagor, who had alongwith the usufructuary mortgage, also executed a lease agreeing to pay the rent, suit for the mortgage money.[18] Suit for money charged on property; suit to enforce the charge.[19] Suit for possession ignoring a mortgage; subsequent suit for redemption of that mortgage.[20] Suit for declaration and injunction (after dismissal under proviso to section 42, of old Specific Relief Act), suit for declaration and possession.[1]

Earlier suit for injunction, subsequent suit for declaration of title and possession.[2] Earlier suit by the adopted son for possession of some

11 *Shib Singh* v. *Jograj*, A 1930 All 116.

12 *Harichand* v. *Cheragdin*, 122 IC 733 Lah.

13 *Laluchand* v. *Girjappa*, 20 B 469; *Rajmohan* v. *Sardacharan*, A 1936 Cal 200, 162 IC 709.

14 *Jhandomal* v. *Ruliamal*, A 1937 Lah 633, 169 IC 692.

15 *Geeta Bose* v. *Machine Tools India Ltd.*, A 1992 Cal 116 (DB).

16 *Inacio Martins* v. *Narayan Hari Naik*, A 1993 SC 1756. *Umed Dholchand* v. *Prisaheb*, 7 B 134; *Anantanarayan* v. *Savitri*, 36 M 151.

17 *Preonath* v. *Bishnath*, 29 A 256.

18 *Ralia Ram* v. *Amin Chand*, 74 IC 122, 4 Lah 52, 5 LLJ 259; *Bhagwan Das* v. *Jalaldin*, 69 IC 54 Lah; also see *Md. Ahsanul Tuadid* v. *Akhtar Hasan*, A 1960 Pat 106.

19 *Bank of Bihar Ltd.* v. *Omitave Chatterji*, 186 IC 221 Pat.

20 *Jaimal* v. *Ganeshi*, 4 Lah 187, 5 LLJ 296, 75 IC 528; *Kalinath* v. *Manindra Nath*, A 1940 Cal 550.

1 *Mahomed Khan* v. *Shafi*, 120 IC 509, A 1930 Sindh 87; *Bondey Ali* v. *Gokul Misir*, 34 A 172.

2 *Inacio Martins* v. *Narain Hari Naik*, A 1993 SC 1756.

properties on the ground that he was the sole surviving coparcener subsequent suit by him for general partition of all the properties.[3] Earlier suit by the mortgagor assailing defendant- mortgagor's right to auction mortgaged property instituted before the auction took place, subsequent suit for the declaration that the auction sale was void.[4] The prior suit for recovery of consideration by a usufructuary mortgagee would not bar a subsequent suit for possession.[5] Earlier suit for declaration and injunction on the basis of possession, subsequent suit for possession on the ground that the defendant has trespassed on the suit property.[6] Previous suit for specific performance of agreement relating to re-conveyance of the suit property, subsequent suit for redemption of the mortgage relating to the suit property.[7]

Suit for ejectment on ground of default in payment of rent; and suit for arrears of rent.[8] Suits for partition of different properties among tenants in common.[9] Suit for rent [10] or mesne profits for different years.[11] Previous suit for possession and mesne profits, subsequent suit for recovery of arrears of rent.[12] Suit by one co-sharer against the other in exclusive possession for share of profits, suit for partition, joint possession and profits for subsequent year.[13] Suit for rent at old rate when proceedings for enhancement were pending, after decree in enhancement suit for additional rent (as enhanced) for the same years.[14] Suit by a co-sharer against *lamberdar* for account of one year, similar suit about subsequent year.[15] Suit for declaration of title to property purchased by plaintiff and

3 *Sangappa Sadappa Bhavari* v. *Gourvva*, A 1993 Kant 1.
4 *Satyapal* v. *Rukayyabai*, A 1993 Bom 203.
5 *Rangasami Goundan* v. *K. R. Rangai*, A 1955 Mad 545.
6 *K. Palaniappa* v. *Valliammal*, A 1988 Mad 156.
7 *Mahammad Sanoowar* v. *Asman Ali*, A 1989 Gau 71.
8 *Khushi Ram* v. *Abdul Ghafur*, 63 IC 978; *K. Varalakshmamma* v. *T. Raghulu*, (1987) 2 Andh LT 75 (AP).
9 *Khetro Mohan* v. *Mohim Chandra*, 17 CWN 521; *Amar Nath* v. *Ganesha*, A 1971 P & H 241; *Shambhudutt* v. *Srinarain*, A 1954 Raj 269.
10 *Narbadeshari Pd.* v. *Saheb Singh*, A 1951 All 561.
11 *Bhumanna Poshatty* v. *Narayan Sadashiv Kilapure*, ILR 1961 Bom 234.
12 *Shivaram T.* v. *T. Chinnanna*, 1987 (1) Kant LJ 296, ILR (1987) 1 Kant 1827.
13 *Dunichand* v. *Jagdesh*, A 1949 East Punjab 243.
14 *Deb Narain* v. *Jagdish Chandra*, 110 IC 395, A 1928 Cal 684, 32 CWN 870 (DB).
15 *Sheoshankar Dyal* v. *Sheo Shankar Sahai*, A 1947 Nag 176.

pre-empted by another person; suit for refund of consideration.[16] Suit for refund of earnest money and suit for specific performance.[17] Suit for declaration of title; suit for pre-emption.[18] Suit by assignee of part of a debt assigned; suit for the remainder.[19]

A suit for interest against the mortgagor personally is no bar to a suit to recover principal and subsequent interest from the mortgaged property.[20] In purchase of goods each purchase gives a distinct cause of action unless the items are connected as to form a continuous demand in which case the whole forms one cause of action.[1] First suit for injunction and declaration that business run by defendant was joint family business without including all joint family property. Subsequent suit for partition of all joint family property and business is not barred.[2]

The plea of a bar under O.2, R.2, requires proof of the precise cause of action in the earlier suit and for this the plaint of the earlier suit must be placed before the court. The cause of action cannot be inferentially presumed in this technical bar.[3]

Several Cause of Action Treated as One Although an obligation and a collateral security for its performance furnish two causes of action, it has been provided that they should be regarded as one cause of action for the purpose of O.2, R.2.[4] And, similarly, successive claims arising under the obligation, although furnishing so many different causes of action, are also deemed to constitute but one cause of action.[5] Therefore, if rent

16 *Alum Khatun* v. *Hayat Khan*, A 1938 Lah 492, 40 PLR 794.

17 *Sumer Chand* v. *Hukam Chand*, A 1965 MP 177.

18 *Ram Krishna* v. *Gurdial*, A 1941 Lah 337.

19 *Sundar Singh* v. *Kuber Singh*, A 1933 Lah 1017.

20 *Lalta Prasad* v. *Puranmal*, 51 A 974; *Sultan* v. *Joti Sarup*, A 1928 Lah 269, 109 IC 613 (DB); *Nidhan Singh* v. *Prem Singh*, A 1940 Lah 498.

1 *Augustus Bros* v. *M.A. Fernandex*, 31 IC 59, 29 MLJ 574, 2 LW 890, 18 MLJ 377, 1915 MWN 765; *Kedar Nath* v. *Dinbandhu*, 47 C 1043.

2 *Lajwant Kaur* v. *Abnashi Singh*, A 1979 Punj 268.

3 *Gurbux Singh* v. *Bhoora Lal*, A 1964 SC 1810 (on power to grant a decree for mesene profits in the absence of prayer); *Tibhu Ram* v. *Pyare Pasi*, A 1967 Pat 423 (FB); *Parimal Sen* v. *P.K. Sen*, A 1985 Ori 286; *Indian Cable Co.* v. *Sumitra*, A 1985 Cal 248.

4 *Narbadeshwar Pd.* v. *Saheb Singh*, A 1951 All 561.

5 O.2, R.2, Explanation.

for four years has became due, and a suit is brought only for two years, a separate suit for the remaining two years would be barred [6] and if a suit is brought on an instalment bond for some of the instalments due up to a date, a fresh suit for the remaining instalments would not lie.[7]

Joinder of Causes of Action : While a plaintiff is not compelled to include in his suit all the causes of action he may have against a defendant, he is certainly at liberty to unite, in one suit as many causes of action against a defendant as he likes.[8] For instance, he may institute a single suit to recover money due on several bonds executed by the defendant at different times.

If there are several plaintiffs, they can unite in one suit, against a defendant, as many causes of action as they like, provided that all the plaintiffs are *jointly interested* in all the causes of action.[9] For instance, if X executes several bonds at different times in favour of A, B and C jointly, the latter three persons can sue X on all the bonds in a single suit. Similarly, a plaintiff can sue several defendants on several causes of action,[10] provided all the defendants are *jointly interested* in all the causes of action.[11] For instance, if A, B and C execute several bonds in favour of X, the latter can sue them jointly on all the bonds in a single suit.

The reason of these rules is obvious. The object of permitting joinder of causes of action in a suit between two individuals is to avoid multiplicity of suits, and when the plaintiffs or defendants are more than one, but are jointly interested in the causes of action, they can safely be regarded as single individual. But joint interest in the main questions raised by the litigation is a condition precedent of joinder of several causes of action in a suit by, or against, several persons. Therefore, it is most important to find out whether there is or there is not, a *joint interest* in the causes of action. The test is whether there is community of interest in the case to be determined.[12] A mere similarity of the claims is no ground for joining in

6 Illustration to O.2, R.2.

7 *Abdul Karim* v. *Md. Jan*, 44 All 663.

8 O.2, R.3.

9 *Tima Mali* v. *Kartika Mehar*, A 1981 Ori 216.

10 O.2, R.3.

11 O.2, R.3.

12 *Bhagwati* v. *Bindeshari*, 6 A 106; see also, *Shukur Hasan Mutwalli* v. *Malkappa*, A 1980 Bom 213.

one suit several claims, which are several and distinct against several persons. For instance, if A and B execute one bond in favour of X, and B and C jointly execute another bond in favour of the same X, X cannot bring a single suit against A, B and C on the two bonds, claiming a certain amount against A and B and a certain amount against B and C. A suit for possession by redemption against one set of defendants and for possession, by ejectment against other defendants, cannot be allowed.[13]

But in one case several causes of action can be joined in one suit by or against several persons even when they are not jointly interested in all the causes of action, that is, when the causes of action arise from the same act or transaction, and there is common question of law or fact.[14] For instance, if A and B are jointly prosecuted by X for an offence and are acquitted, though the causes of action for suits for malicious prosecution by A and B are different, yet they can bring a joint suit, as the causes of action arise from a single act of X and as common questions of fact and law would arise. O.1, R.3 and O.2, R.3, if read together, indicate that the question of joinder of parties also involves the joinder of causes of action. The plaintiff could file an appeal against the person against whom the suit was dismissed notwithstanding that it was decreed against the other.[15]

Exceptions : To these rules permitting joinder of causes of action there are the following two exceptions :

1. No other claim can, unless with the leave of the court, be joined with a suit for the recovery of immovable property, except—

(a) Claim for mesne profits or arrears of rent in respect of the property claimed or any part thereof ;

(b) Claim for damages for breach of any contract under which the property or any part thereof is held;

(c) Claim in which the relief sought is based on the same cause of action.[16]

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13 *Anand Sarup* v. *Asad Ali*, 14 ALJ 342, 28 IC 602; *Brunda Bali* v. *Hari Biswal*, 1971 (1) CWR 699; *Kalicharan* v. *Ganesh Prasad*, A 1971 All 507.

14 O.1, R.1 and 3.

15 *Iswar Bhai C Patel* v. *Harihar Behera*, A 1999 SC 1341.

16 O.2, R.4.

It must be noted that this exception relates only to suits *"for the recovery of"* immovable property, and not to suits merely relating to such property, such as suits for declaration of title,[17] or specific performance of a contract,[18] or sale of immovable property in enforcement of mortgage.[19]

The "leave" required by this rule should generally be obtained before filing a suit.[20] It may be convenient to present an application for leave with the plaint. But there is nothing to prevent leave being given after the institution of the suit.[1]

When a Mohammedan M, died leaving two heirs, A and B, and one C purchased immovable property inherited by A from M, and movables inherited by B from M, and both were in possession of one D, C was allowed to bring a joint suit against D for both the properties, as his cause of action was one, viz., dispossession and defendant's refusal to deliver up the property.[2] For the same reason, a claim for injunction, for appointment of receiver or for a declaration of title may be added to a claim for possession, provided such claims do not relate to different cause of action. A Hindu widow may in the same suit ask for recovery of immovable as well as movable properties from her husband's coparceners on the basis of a partition which had not been completed during his life time.[3]

2. No claim by or against an executor, administrator or heir *as such* shall be joined with claims by or against him *personally*, unless the last mentioned claim (a) is alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir, or (b) is such as he was entitled to, or liable for, jointly with the deceased person whom he represents.[4]

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17 *Gledhill* v. *Hunter*, (1880) 14 Ch D 492.

18 *Cutts* v. *Brown*, 6 C 328.

19 *Gora Chand* v. *Basanta*, 12 IC 684, 15 CLJ 285.

20 *Pilcher* v. *Hinds*, 11 Ch D 905; *Canning Mitra Phoenix Ltd.* v. *Popular Constructions*, A 1993 Bom 67 (relied on *Krishna Ramchandra* v. *Raghunath Shanker*, A 1954 Bom 125, dissented from *Edra Venkayya* v. *Edara Venkata Rao*, A 1938 Mad 979).

1 *Llyod* v. *Great Western Dairies Co. Ltd.*, (1907) 23 Times LR 570, 2 KB 727; *Union Bank of India* v. *Logic Systems Pvt. Ltd.*, A 1992 Delhi 153.

2 *Ganesh Dutt* v. *Tewach*, (1904) 31C 262 PC, 31 IA 10.

3 *Ganesh Dutt*, supra.

4 O.2, R.5.

In this rule the words "*as such*" are to be specially noted, for if an heir brings suit in respect of property inherited by him and which has thus become his own property, the suit cannot be said to have been brought by him as such heir, but it is a personal suit to which he can join any other personal cause of action. Thus a Mohammedan widow's suit against other heirs for her dower debt and for her share in the inheritance of her husband is maintainable, as the latter claim is not as representing the estate of her husband but in her personal capacity and for her own benefit.[5] Similarly, a Hindu widow's suit against the executors of her husband's estate for recovery of her *stridhan* and her share in her husband's estate is maintainable.[6] In a Madras case, plaintiff's father had carried on a business in partnership with the defendant, and after his death, plaintiff and defendant, carried on business with the old partnership assets, the plaintiff then obtained letters of administration in respect of his father's estate and sued for the accounts of partnership of the time of his father. He also joined a claim for his share in partnership after the death of his father. The High Court held that the claim was maintainable, as both the claims "arise with reference to the estate in respect of which he is suing as administrator".[7]

Order of Separate Trials : Even when joinder of causes of action is permissible or when a plea as to misjoinder is deemed to be waived,[8] under the above rules, the court always has power to order separate trials of the different causes of action or to make such other order as may be expedient, in case it thinks that all the causes of action so united cannot conveniently be tried or disposed of in one suit.[9] But the privilege of ordering the trial to be split up into two or more trials can be exercised by the court alone. The defendant cannot claim it as of right. If the court does not find it inconvenient to try the suit as brought, the plaintiff is certainly entitled to continue the suit in the form in which he has instituted it.[10] But the court has no power to dismiss a part of the suit and to try the rest or,

5 *Ahmad-ud-din* v. *Sikandar*, 18 A 256; *Hafiza Boo* v. *Md.*, 31 Bom 105.

6 *Hafiza Boo*, supra.

7 *Arunachellam* v. *Arunachellam*, 43 MLJ 218, 16 LW 175, 69 IC 966, 1922 MWN 453.

8 *Ahmadbhai* v. *Dinshaw*, (1911) 12 IC 813 Bom.

9 O.2, R.6.

10 *Mohd. Ishaq* v. *Abdul Majid*, 1954 ALJ 34.

except in very rare cases, to order the plaintiff to withdraw one part of the suit with liberty to bring a fresh suit. The power is discretionary, and, if the trial court does not think it necessary to exercise it, the Appellate Court will ordinarily not interfere.[11] This rule, it must be noted, applies only when the joinder of causes of action is inconvenient or embarrassing but is otherwise legal and proper. It has no application to cases in which the joinder of causes of action is not permitted by law, and the judge should not overlook a misjoinder of causes of action simply because he thinks he can conveniently try them in one suit.[12] When the court passes an order under O.2, R.6, the plaintiff should not be required to file separate plaints, but he may be given an opportunity to amend the plaint so that the allegations against each set of defendants in respect of the subject-matter of the cause of action against each are separately set out so as to enable the court to try the suit in sections.[13]

A suit which offends against the rules relating to the joinder of causes of action is said to be bad for misjoinder, which may be of one of the following three kinds :

(1) Misjoinder of Causes of Action : Where a suit for damages for an alleged tort is joined with one for recovery of immovable property and the leave of the court is not obtained, or where a suit against a trustee relating to trust property is joined with a claim against the trustee in his personal capacity.

(2) Misjoinder of Plaintiffs and Causes of Action : This arises when there are several plaintiffs and they are not jointly interested in all the causes of action, nor do the causes of action in which they are severally interested arise from the same transaction, or, when they do arise from the same transaction, they present no common question of law or fact.[14] A suit by one of the two widows and an adopted son of a deceased, claiming to recover either the whole family estate for the latter, or in case adoption is not held valid, one-half of the estate for the former, was held bad for

11 *Paira Ram* v. *Kesho Nath*, 73 IC 892, A 1924 Lah 156; see also, *Swami Khat Khata Nand* v. *Surajpal*, A 1941 Oudh 56.

12 *Ram Pd* v. *Sachi Dassi*, 6 CWN 585.

13 *Inder Bahadur* v. *Sitaram*, A 1941 All 209, 195 IC 145; *Hardwari Lal* v. *Narain Das*, A 1951 Simla 233.

14 *Chethru* v. *Md. Karim*, 50 IC 328, 4 Pat LJ 297.

misjoinder of plaintiffs and causes of action.[15] It has, however, been held that a widow and adopted son, if there is no dispute between them can bring a joint suit against the brother of the deceased to recover property which they claim as belonging to the deceased but which the brother alleges belongs to himself.[16] A suit by a Hindu widow with her two daughters as co-plaintiffs against her step-son for maintenance and for marriage expenses of her daughters was held to be not bad for misjoinder.[17]

Where several plaintiffs each claiming title by adverse possession to different parcels of land, filed one suit for eviction, it was held that the suit was bad for misjoinder and that plaintiffs should be put to election.[18] A suit by several plaintiffs jointly for damages for libel against the defendants is bad for misjoinder of the plaintiffs and causes of action.[19] Similarly, several creditors to each of whom separate debts are owed by the same debtor cannot jointly sue for the avoidance of a deed of gift alleged to have been fraudulently executed by the debtor.[20] A suit principally for partition and eviction of tenants is bad for misjoinder of causes of action and is not maintainable.[1]

But if the cause of action is one, the fact that the several plaintiffs derive their right to the property under separate titles will not affect the right to bring a joint suit. Thus several plaintiffs acquiring shares in the same property differently may bring one suit for possession of the property against persons dispossessing them.[2]

(3) Misjoinder of Defendants and Causes of Action : This defect is technically called "*multifariousness*", and arises when neither all the defendants are jointly interested in the causes of action nor do the causes of action arise from the same transaction, or, when they do arise from the same transaction, they do not present any common question of law or

15 *Lingam Mal* v. *Chinna*, 6 M 239.
16 *Fakirapa* v. *Rudrapa*, 16 B 119; *Ningawa* v. *Ramappa*, 28 B 94; *Haramani* v. *Hari Churn*, 22 C 833.
17 *Tulsa* v. *Gopal Rai*, 6 A 632.
18 *Hadu Sahu* v. *State of Orissa*, A 1964 Ori 159.
19 *Aldridge* v. *Barrow*, 34 Cal 662.
20 *Rajjo* v. *Debi*, 18 A 432.
1 *Dwarka Prasad* v. *Kishan Lal*, A 1986 All 174.
2 *Girja Nath* v. *Surendra*, 16 IC 84, 16 CLJ 1.

fact. The following are a few instances of multifarious suits :— B agrees to sell land to A. A sues B for specific performance of the contract and joins C on the allegation that B was willing to execute the sale deed, but that C was in possession of the title deeds and was holding out a false claim of having an equitable lien, and that the plaintiff wants a declaration that C has no such lien.[3] A suit by one of the partners claiming dissolution of partnership against the other partners and damages for breach of contract against another person, who is described as the plaintiff's agent in collusion with the partners.[4] A suit by a plaintiff, to whom a member of a joint Hindu family had agreed to transfer his share, for specific performance of the contract against him, and for partition of that share against the other members.[5] A landlord may file one suit against the same tenant in respect of two portions of the same premises and the suit is not bad for multifariousness.[6] But a single suit to eject different tenants holding different parcels of land has been held to be bad for misjoinder.[7]

Where, as a matter of fact, the plaintiff has but one cause of action against several defendants there can be no multifariousness and he can bring one suit, although the defendants might claim under different titles, or might have different defences.[8] For instance, in a suit by a reversionary heir for a share in the estate, all the persons in possession of different portions of the estate under separate sale-deeds executed by the widow can be joined. Similarly, a member of a joint family wishing to set aside various alienations made by his father in favour of different persons can bring a single suit against all.[9] Similarly, when A claims possession of land under a lease from B, and subsequently B lets the land in different parcels to C, D and E, who dispossess A, A can sue C, D and E in one suit, because they derive their title from a common trespasser B. But if the several persons in possession do not claim under the same trespasser, and have separately trespassed on different portions of the land, or have entered

3 *Luckumsey* v. *Fazulla*, 5 B 177.
4 *Muthappa* v. *Muthu*, 27 M 80.
5 *Ramjayya* v. *Subramania*, 40 M 365 (FB).
6 *Kishan Lal Singhania* v. *District Judge, Kanpur*, A 1991 All 13.
7 *Sethuratnam* v. *Venkata*, ILR 43 Mad 567 (PC).
8 *Purshottam* v. *Bhagwanrao*, 1938 NLJ 210, A 1938 Nag 461, 178 IC 215, 11 RN 211.
9 *Inder Bahadur* v. *Sita Ram*, A 1941 All 209, 195 IC 145.

into possession under different titles derived from different persons, they cannot be sued jointly.[10] When different defendants commit separate wrongs against the plaintiff, but as the result of a conspiracy between them, the conspiracy will be the common cause of action, and a joint suit will be maintainable.[11]

Where A, alleging that his brother B mortgaged his (A's) share to C and that C is in possession, sues B and C for a declaration of his title and for possession, the suit is not bad.[12] A sells three properties to B. After the sale, they are attached in execution of a decree against A and purchased by D, E and F respectively. A suit by B against A, the decree-holder, and the purchasers to set aside the execution sales is not bad.[13] Where the defendant has infringed copyright and trade mark of the plaintiff, a single suit relating to two different causes of action viz., trade mark and copyright is maintainable.[14] One suit for the recovery of consolidated amount advanced to defendant on different promissory notes may be filed.[15] A plaintiff may in a suit filed against the Railways claim damages in respect of several consignments booked through one railway receipt lost in transit.[16]

Where the first defendant has borrowed loan from the bank and had been supplying the goods produced by it to various parties who drew hundies and made payments directly to the bank, a suit by the bank against the first defendant and all such parties is not bad.[17] In a suit by an assignee of a mortgage, the plaintiff also added the assignor praying in the alternative for a decree against the assignor. It was held that in the interest of saving unnecessary litigation the suit should not be objected to and the court

10 *W. Dhar* v. *Htoon May*, 52 IC 927, 12 Bur LJ 106; *Afzal Shah* v. *Lachmi Narain*, 40 A 7 (11); *Dwa Hla Gyi* v. *Maung Po Thaugn*, A 1938 Rang 420.

11 *Varajlal* v. *Ramdat*, 26 B 259; *Reddi* v. *Madava*, 20 M 260; *Lockonath* v. *Keshab*, 13 C 147.

12 *Inder Kr.* v. *Gur Pd.*, 11 A 33; *Mazhar* v. *Sajjad*, 24 A 358; *Kubra* v. *Ram Bali*, 30 A 560.

13 *Harnand* v. *Prosuno Chandra*, 19 C 703; *Gumani* v. *Ram Charan*, 1 A 555.

14 *Jay Industries* v. *Nakson Industries*, A 1992 Delhi 338.

15 *Brojkishore Jain* v. *II Addl. Distt. Judge, Aligarh*, 1985 ALJ 1256, 1985 All W.C. 742) (All).

16 *Union of India* v. *Ashok Kumar Rasik Lal & Co.*, A 1987 Orissa 264 (DB); *E.I. Railway Co.* v. *Ahmadi Khan*, A 1924 Pat 596 (DB).

17 *State Bank of Patiala* v. *Hypine Carbons Ltd.*, A 1990 HP 10.

applied section 99 C.P.C. in appeal when an objection of multifariousness was pressed.[18]

Where one of the two defendants is joined merely *proforma*, and the real causes of action are against the other only, there is no defect of multifariousness. For instance, a single suit for pre-emption under several sale-deeds, all in favour of one defendant, can be brought, though the vendors, who are several, are added as *pro forma* defendants.[19]

Procedure in Case of Misjoinder : All objections by defendant on the ground of any of the different kinds of misjoinder of causes of action must be taken by him at the earliest opportunity, and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen (as by a subsequent amendment of the plaint by the plaintiff).

When such an objection is taken or when the defect is otherwise brought to the notice of the court, the court may order or permit the plaintiff to amend the plaint by withdrawing a portion of the claim with liberty to bring it again, and if the plaintiff fails to amend the plaint, the suit may be dismissed, but it should not be dismissed without giving the plaintiff an opportunity to amend the plaint, nor has the court power to dismiss one portion of the suit and to try the other in order to remove the defect of misjoinder.[20]

If a defendant does not, however, raise a plea of misjoinder, at or before the settlement of issues, the plea shall be deemed to have been waived,[1] and cannot be taken, at a later stage, certainly not in appeal.[2] If the plea is raised and decided by the trial court, the decision will not be interfered with in appeal, even if it is erroneous, if it does not affect the merits of the case or the jurisdiction of the court.[3]

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18 *Chandra Kant* v. *Basmatia*, 22 Pat LT 196.

19 *Pairaram* v. *Kesho Nath*, 73 IC 892, A 1924 Lah 156.

20 *Singa* v. *Madava*, 20 M 360.

1 O.2, R.7.

2 *Damodar Pd.* v. *Rumal*, 1966 AWR (HC) 195.

3 *See* section 99, C.P.C.; *Mohamed Husain* v. *Kishva Nandan*, A 1937 PC 233, 169 IC 1, 41 CWN 1029, 1937 AWR 631; *Ram Dhan* v. *Lachminarain*, 166 IC 649, A 1937 PC 42; 1937 AWR 184, 41 CWN 418.

Chapter XII

PARTIES TO SUIT

The next question which has to be considered before drafting a plaint is as to who can join in a suit as plaintiff, and who can, and should, be impleaded as defendant. For, though a suit may not necessarily fail on account of any error in this respect, the plaintiff may have to amend his plaint, paying heavy costs to the other party, or if he has failed to implead the right person as a defendant he might find it impossible to implead him later as limitation may have run out by the time the omission is detected.

General : Order 1, C.P.C. carries the heading 'parties to suits'. Rule 1 relates to joinder of plaintiffs, while Rule 3 is in respect of joinder of defendants. In case of plaintiffs, a right to relief must be alleged to exist in their favour whether jointly, severally or in the alternative. It must further be shown that such a right arises out of the same act or transaction, or series of acts and transactions, *i.e.* the same cause of action. For joinder of defendants the relief should be claimable against all of them jointly, severally or in the alternative and it should be the outcome of the same cause of action. It is also necessary that the matter is so connected as to give rise to a common question of fact and law. Out of the above proposition of law crops up the question of misjoinder or non-joinder of plaintiffs on the one hand and of defendants on the other, in relation to the cause of action, *see* O.1, R.9.

1. Necessary Parties and

2. Proper Parties

A necessary party means a party whose impleadment in the suit is absolutely necessary for determining the controversy between the parties and in whose absence no decree can be passed.[1] They are parties who ought to have been joined' within O.1, R.10(2). A proper party, on the other hand, connotes a party whose presence in the suit helps the court in passing an effective decree and in completely deciding the rights and liabilities of the parties. No relief may be claimed against a party, but if the

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1 *Sarwinder Singh* v. *Dalit Singh*, 1996 (6) SCC 59; *Ramesh Hirachand Kundanmmal* v. *Municipal Corporation of Greater Bombay*, 1992 (2) SCR 1.

presence of such a party before the Court is necessary for proper adjudication of the subject matter of the dispute, he is a proper party though not a necessary party to the suit.[2]

The test in every case is whether there is a breach of any provision in law or rules which requires any one to be joined in the array of parties, and whether that provision is mandatory or merely directory. If it is the former, nonjoinder is fatal.[3] It is the duty of the Court to see that the parties are properly arrayed. Even mistake committed by a party in arraying parties may be rectified by the Court.[4] The court has to see whether in the absence of a particular party it can or cannot proceed to determine the rights of the parties. If it cannot it should refuse to give any relief.[5]

Joinder of Plaintiffs : The question as to who may join as plaintiff should first be considered. Whenever a suit relates to a joint right, all the co-sharers not only may join but as far as possible must join as plaintiff[6] as they represent a single and indivisible right, and if any co-sharer in the joint right does not join as a plaintiff, or there are other substantial grounds for allowing one co-sharer to sue, the latter should join the other co-sharers as *pro forma* defendants.[7] It is not, however, necessary to prove that such person had refused to join as a plaintiff.[8] For instance all the partners must be joined in any suit concerning partnership business,[9] all

2 *Gunendra Kumar* v. *Dura Steamship Ltd.*, A 1989 Cal 398; *Janak Yadav* v. *Sarabjit Rai*, A 1984 Pat 307; *Udit Narain Singh* v. *Additional Member, Board of Revenue, Bihar*, 1963 SC 786; *U.P. Awas Evam Vikas Parshanth* v. *Gayan Devi* A 1995 SC 724 (para 22).

3 *Jagannath* v. *Jaswant Singh*, A 1954 SC 210; *Maqsood Ali* v. *Zahid Ali*, A 1954 All 385.

4 *State of Assam* v. *Basanta Burman*, A 1985 Gauh 13 (DB).

5 *State of Punjab* v. *Nathu Ram*, A 1962 SC 89; *Sardar Nogendra Singh* v. *Jaidev*, 1968 MPLJ 176; *Hardev* v. *Ismail*, A 1970 Raj 167.

6 *S.A. Siluvai Muttin* v. *D. Sahul*, 98 IC 549, 51 MLJ 648; *Aswani Kumar Roy* v. *Kshetish Chandra Sen Gupta*, A 1971 Cal 252; *Md. Hasan* v. *Nazar Md.*, A 1916 Pat 44 (DB) (suit by some members of committee bad).

7 *Deoshi* v. *Bhikham Chand*, 100 IC 993, 29 BLR 147; *Munshi Sahu* v. *Bhuppal Mahton*, 163 IC 405, A 1936 Pat 274; *Ponnusamy* v. *Ram*, A 1979 Mad130; *Jagadish* v. *Ramlal*, A 1988 All12.

8 *Tarini Kant* v. *Nand Kishore*, 12 CLR 588; *Pyari* v. *Kedarnath*, 26 C 409 (FB), 3 CWN 371; *Biri Singh* v. *Nawal*, 24 A 226; *Peria* v. *Velayutham*, 29 M 302; *Balkrishna* v. *More*, 21 B 154; *Ramchand* v. *Shadi*, 153 IC 871, A 1931 Lah 445.

9 *Rajchander* v. *Ramgati*, 31 C 487.

the co-sharers must (except where the contract of tenancy was entered into by one or more only who are plaintiffs [10]) join in a suit for the ejectment of a tenant,[11] or for enhancement of rent,[12] or for arrears of rent.[13] In all such cases when some of the partners are added as proforma defendants the court should grant the appropriate relief and decree may be passed in favour of the plaintiffs and such defendants.[14] After the death of one partner the surviving partners may sue to recover the debts of the partnership without joining the heir of the deceased partner.[15] Even if one co-sharer has to sue for rent, making the others proforma defendants, he must sue for the whole rent and not for his share only,[16] nor in a suit for enhancement, in respect of his share only [17] unless a special arrangement is proved.[18] This rule is applicable to suits arising out of contracts only.

It is not necessary that all the co-sharers should join in a suit against a trespasser,[1] but any one co-sharer can sue a trespasser. The reason is, that every co-sharer is independently interested in saving the property from the invasion of a trespasser and the cause of action in such cases does not accrue to all jointly. A co-owner can file suit against a trespasser.

10 *K Vasudeva* v. *Jadunandan*, A 1977 Cal 142; *Durga Pd* v. *Debidutt*, A 1962 Assam 27; *Vagha* v. *Manilal*, A 1935 Bom 262; *Ram Baksh* v. *Chanda*, 2 IC 306 All; *Gopal* v. *Dhakeshwar*, 35 C 807; *Rama* v. *Tupoo Rama*, A 1956 Bom 264.

11 *Balkrishna* v. *Moro*, 21 B 154; *K P. Kanna Pisharody* v. *Narayanan*, 3 M 234; *Ghulam Mohiuddin* v. *Khairan*, 31 IC 786.

12 *Baidyanath* v. *Illim*, 25 C 917; *Bhola* v. *Balchamber*, 10 IC 891, 14 CLJ 373.

13 *Pramada* v. *Ramani*, 35 C 331; *Shashi* v. *Sitanath*, 35 C 744, 7 CLJ 425, 12 CWN 835.

14 *Monghibai* v. *Cooverji*, A 1939 PC 170, 182 IC 1.

15 *Maung Shwe* v. *Ma Lonma*, 7 R 558, A 1929 Rang 310.

16 *Biharilal* v. *Wasundarabai*, A 1956 MB 35; *Radhabindu* v. *Naba Kishore*, 94 IC 244, 30 CWN 415, A 1929 Cal 568; *Gopaldas* v. *Lokamal*, 182 IC 718, A 1939 Sind 173.

17 *Jatindra* v. *Prosanna*, 38 Cal 270 PC.

18 *Pramada Nath* v. *Rani Kant*, 38 Cal 331 PC.

1 *Shivji* v. *Hiralal*, A 1984 MP 131; *Shivangokda* v. *Gangawwa*, A 1967 Mys 143; *M.Palaniswamy* v. *Nachimuthu*, (1977) 2 MLJ 131; *Mannu* v. *Nasratullah Khan*, 21 AWN 36; *Gangaram* v. *Relu*, A 1933 Lah 999; *Ambika* v. *Rameshwar*, A 1946 Oudh 221; *Moti Lal* v. *Basant Lal*, A 1956 All 175; *Sundarammal* v. *Sadashiv Reddiar*, A 1959 Mad 349; *Ram Narain Das* v. *Loknath Mandal*, A 1970 Pat 1 (FB) over ruling, *Abdul Kabir* v. *Mt. Jamila Khatoon*, A 1951 Pat 315; *Gyanendra Nath* v. *Anam Bhor*, (1972) 38 CLT 819.

all other co-sharers are not necessary parties.[2] In a suit by a co-owner against the trespassers, all other co-owners are not necessary parties where the plaintiff co-owner has not refuted the rights of the other co-owners.[3] A tenant continuing in possession without the consent of the lessor after the expiry of his lease is tenant on sufferance and his position is akin to that of a trespasser. He can, therefore, be sued by one of the co-sharers alone.[4] It has however, been held that a suit by a member of a joint Hindu family, to recover joint family property must be instituted by or on behalf of all the members of the family.[5] But the Manager of the joint family need not add other members as a party in a suit to recover possession of the property belonging to the joint family.[6] A suit may be brought by the Manager of the joint Hindu family on behalf of the family business and all the members need not be impleaded.[7] In a suit for the recovery of rent due to joint property, all the co-owners are necessary parties to the suit.[8]

Where, however, the suit does not relate to a joint right, every person who has a cause of action for the suit can bring a separate suit. But in certain cases several persons can, if they choose, join in one suit, even though their causes of action may be separate and distinct. They can do so when (i) the right to relief alleged to exist in them (whether jointly, severally or in the alternative) arises out of the same act or transaction, or series of acts or transactions, *and* (ii) the case is of such a character that if such persons brought separate suits, any common question of law or fact would arise.[9] Both these conditions must be satisfied before any two or more persons can join one suit. For instance, several persons jointly prosecuted by the defendant may bring a joint suit for malicious

2 *B. Visala* v. *Sundaram Bhaskaran*, A 1994 Ker 164; *Deban Kumbhar* v. *Sribasta Patna*, A 1994 Ori 86; *Murti Shri Durga Bhawani* v. *Habhajan Singh*, 1988 Rev LR 105, 1987 Pun LJ 555 (P&H).

3 *Nachal* v. *C. Arjunan*, (1996) 1 MLJ 338 (Mad).

4 *Maganlal* v. *Budhar*, 101 IC 35, 51 B 149, 29 BLR 230.

5 *Jugal Kishore* v. *Hulasi*, 8 All 264.

6 *Allam* v. *Gollapalli*, A 1968 AP 219.

7 *Gendalal* v. *Namalal*, A 1965 MP 58; *Hirji Bhai* v. *Balaram Bhai*, A 1956 Nag 125; *Surajmal* v. *Union*, A 1956 Pat 478.

8 *Abdul Ajeeju* v. *L. Somulu*, 1988 (2) APLJ 216 (AP).

9 *Allam Ganga Dhar* v. *Gollapelli*, A 1968 AP 291; *Gulzar Khan* v. *Gram Panchayat Bora Kalan*, 1989 Punj LJ 176 (P&H) (DB).

prosecution.[10] Where plaintiffs 1 and 2 claimed the entire money and plaintiffs 3 and 4 claimed a portion in a certain contingency, a joint suit against the person who was withholding that money unlawfully was permitted as the causes of action arose from the same act (viz. unlawful detention of money by the defendant), and there was a common question of fact involved.[11] The expression 'common question of law or fact' does not mean same or similar question of law or fact.[12] Hence a single suit for eviction against two defendants in distinct portions of the house with separate tenancy is not maintainable.[13]

All persons may join as plaintiffs when both the conditions laid down by O.1, R.1, are satisfied. Such plaintiffs can file separate suits, but they have been given additional right to join in one suit.[14] A co-owner can maintain a suit. The absence of other co-owners cannot disentitle landlord from suing for eviction. Any co-owner can file a suit for eviction even in the absence of the other co-owners.[15]

In a suit for recovery of money on the basis of promissory note by assignee, assignor-original payee is to be arrayed as defendant and not as a plaintiff.[16] Persons claiming right of pre-emption as owners of contiguous plots where common questions of law and fact arise can be joined as plaintiffs in one suit.[17] It is not necessary that every plaintiff should be interested in the entire subject matter of the suit.[18] So, 30 plaintiffs though not interested in all the properties, may bring one suit to have their occupancy right declared as that issue is common to all.[19]

Joinder of Defendants : The same rule is applicable to joinder of defendants. Several persons against whom a right to relief is alleged to exist (whether jointly, severally or in the alternative), can, if a plaintiff so

10 O.1. R.1.

11 *Velappa* v. *Chidambram*, 43 MLJ 277, 70 IC 684, 1922 MWN 216, A 1922 Mad 174; *Kamlabai* v. *Shentirai*, 1983 Mah LJ 221.

12 *Kanhayalal* v. *Keshodas*, A 1961 MP 46.

13 *Kali Charan* v. *Ganesh*, A 1971 All 501.

14 *Gulzar Khan* v. *Gram Panchayat Bora Kalan*, 1989 Punj LJ 176 (P&H) (DB).

15 *Laxmi Shankar Hari Shankar Bhatt* v. *Yashram Vasta*, 1995 (1) ARC 52 (SC).

16 *Vijalatha Chit Fund (P) Ltd.* v. *K.L. Krishna Shetty*, (1988) 1 Kant LJ 143 (DB).

17 *Sadhan Ch. Samanta* v. *Jalada Bala Dasai*, (1986) 90 CWN 809 (DB).

18 *Md. Khalil* v. *Mahboob*, A 1942 All 122.

19 *Cherukur* v. *Kardadi*, A 1950 Mad 12 (DB).

chooses, be joined in one suit, even though the causes of action against them are different, provided they have arisen from the same act or transaction, or series of acts or transactions, and, the case is of such a nature that, if separate suits were brought against such persons, any common question of law or fact would arise. Both the conditions must be satisfied.[20] If the causes of action do not arise from the same transaction defendants cannot be joined even though a common question may arise.[21] Such common question may, however, be only one out of a number of questions at issue.[22] For instance, a suit to set aside an auction sale of plaintiff's property purchased in different lots by A, B and C may be brought jointly against all the three purchasers.[1] A reversioner can jointly sue all the alienees of a widow for recovery of the property transferred by her separately to them.[2]

A purchaser of property dispossessed by a third person who asserts title in himself may bring a joint suit against that person for possession and against the seller for refund of purchase money in the alternative.[3] Similarly, in a suit against a debtor for money lent by plaintiff's agent, the agent may be joined with an alternative prayer that, if it be found that he had not lent the money to the defendant as he had represented, a decree for the money may be passed against the agent.[4] In a suit by a landlord against his agent for rents realised by the latter, when the agent pleaded that he had not realised a part of the rent, plaintiff was allowed to implead the tenant with the alternative prayer for recovery of rent from him.[5] O.1, R.3 and O.2, R.3, if read together, indicate that the question of joinder of parties involves joinder of causes of action.[6]

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20 O.1, R.3; *Kanhaiyalal* v. *Keshodas*, 1961 MP 46.

21 *Ram Avtar* v. *Brij Kishore*, A 1933 Pat 653.

22 *Soun* v. *Bahinbai*, 40 B 351, 33 IC 950

1 *Dorasami* v. *Muthusami*, 27 M 94.

2 *Balakrishna* v. *Hiralal*, 36 A 406, 94 IC 95, 12 ALJ 509; *Jivan* v. *Garbah*, 25 PWR 1924, 59 IC 522; *Ralia Ram* v. *Mulk Raj*, 54 IC 512, 2 UPLR 1918; *Lal Chand* v. *Manohri*, 44 IC 549, 64 PWR 1918.

3 *Serajulhaq* v. *Abdul Rahman*, 29 C 257.

4 *Heyappa* v. *Perinnan*, 29 M 50.

5 *Bhagoti* v. *Chandra*, A 1933 All 177.

6 *Iswar Bhai C. Patel* v. *Harihar Behera*, A 1999 SC 1341.

In a suit against the legal representatives of a deceased debtor, plaintiff must be deligent to find out and implead *all* the legal representatives, though if he omits anyone by a *bona fide* mistake, the estate will still be liable.[7] Where a Muhammedan died leaving several heirs, a suit for rent against some of them was held to be bad.[8]

Suits on Contract : If several persons join in making a contract, their liability may be joint or several or joint and several. If the liability is several, the several persons may be sued separately to the extent of the several liabilities of each, or they may all be sued jointly.[9] But if the liability is joint, or is joint and several, as in the case of liability for rent of a holding held by several tenants,[10] the suit shall be for the enforcement of the whole liability, but the plaintiff is entitled to join all such persons or only some of them.[11] If, however, he sues some only and the decree is not satisfied by execution against them, he cannot, according to the Calcutta and Bombay High Courts,[12] bring another suit against the person left out, but the Allahabad, Patna and Madras High Courts have taken a contrary view[13] and have held that the English rule[14] on which the Calcutta and Bombay High Court's views are based is not applicable in India. Where a plaintiff could sue *either* of two persons, e.g. a contracting agent and his undisclosed principal, and he sues only one, he cannot afterwards sue other even if his decree is not satisfied.[15] A suit brought by a co-sharer of a deceased Muslim against another co-sharer for possession of his share cannot be dismissed for non-joinder of one of the several co-sharers.[16]

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7 *Mt. Karam* v. *Matwal*, A 1933 Lah 380, 141 IC 580; *Mt Chandri* v. *Hiralal*, A 1933 Nag 73.

8 *Narash* v. *Hayder*, 49 CLJ 83, A 1929 Cal 28.

9 O.1, R. 6.

10 *Inderjit Nath* v. *Maharaja Pratap Udi Nath*, 182 IC 821, A 1939 Pat 230.

11 O. 1, R. 6, read with section 43, Contract Act; *Kailash Chandra* v. *Brajendra*, A 1925 Cal 1056 (DB), 42 CLJ 232, 29 CWN 1000.

12 *Hemendra* v. *Rajendra*, 3 C 353; *Dick* v. *Dhanji*, 25 B 378, 3 BLR 243; *National Petroleum Co. Ltd* v. *Popatlal*, 165 IC 338, A 1936 Bom 344.

13 *Md. Askar* v. *Radhe Ram*, 22 A 307; *Ramanjulu* v. *Aravamudu*, 33 M 317; *Traders Co-operative Bank* v. *Mullick*, A 1934 Pat 702.

14 *King* v. *Hoare*, 13 M&W 494; *Kendall* v. *Hamilton*, 41 LT 418.

15 *Somasundaram* v. *Subramanian*, 99 IC 742, 1926 MWN 832, A 1926 PC 136.

16 *Zaibaishi* v. *Naziruddin*, 152 IC 1008, 1934 ALJ 1006.

The allegations regarding non-joinder should be clear and not vague.[17] A party is not entitled to take objection for the first time in the appellate court that the suit is bad for non-joinder of parties.[18]

Suits for specific performance of contract : In a suit for specific performance of contract, a purchaser of the property, who wants to safeguard his interest[19] the subsequent vendee who is in possession of the property[20] is a necessary party to the suit. A person who set up title adverse to that of the parties to the suit is not a necessary party.[1] A transferee *pendente lite* though not a necessary party, is a proper party.[2] The subsequent purchaser is a necessary party.[3] The promisees who are no more interested in the execution of the sale-deed may be arrayed as defendants in the suit.[4] In a suit for specific performance of contract in respect of co-parcenary property, the co-parceners resisting the specific performance of the contract are necessary parties.[5] Where the property is mortgaged during the pendency of the suit, the mortgagee is not a necessary party.[6] In a suit against the *karta* of the Joint Hindu Family, the coparceners are not necessary parties to the suit.[7] Where in a suit for specific performance of contract, the property in suit has become *wakf* property, and *mutwalli* has been appointed, both the mutwali and the wakf Board are necessary parties to the suit.[8] The vendor and on his death, his legal representatives are necessary party;[9] a person who purchases the property under subsequent agreement for sale is not a necessary party.[10] A person

17 *Laxmi Sankar* v. *Yashram*, A 1993 SC 1587.
18 *Addepalli Venkata Laxmi* v. *Ayinampudi Narasimha Rao*, A 1994 AP 72.
19 *Adapa Venkateswra Rao* v. *Mohammad Saleman*, A 1994 AP 50.
20 *Narayana Pillai Chandrasekharan* v. *Kunju Amma Thankamma*, A 1990 Ker 177.
1 *Kishan Lal* v. *Tek Chand*, A 1987 P&H 197; *Sadhu Behera* v. *Krishna Chnadra*, A 1985 Ori 93 (may be co-owner of the property).
2 *Gurmauj Saran* v. *Joycee C. Salim*, A 1990 Delhi 13 (DB).
3 *Vimala Ammal* v. *C. Suseela*, A 1991 Mad 209.
4 *Jagdish Singh* v. *Ram Lal*, A 1988 All 12.
5 *Atul Sharma* v. *Gurinder Singh*, 1985 Punj LJ 143 (P&H).
6 *Raizan* v. *Dhara*, 1988 Punj LJ 36 (P&H).
7 *Aman Behal* v. *Aruna Kansal*, A 1987 P&H 52 (DB).
8 *Abdul Jaleel* v. *Aishabi*, A 1992 Kant 380.
9 *Mamni Devi* v. *Ramayan Singh*, A 1985 Pat 35.
10 *Mohammadbhai Sk. Mohsinbhoy* v. *Trustees Calcutta Improvement*, A 1984 Cal 219.

setting up earlier agreement for sale in his favour and in possession of the property is necessary and proper party.[11]

Landlord's suits for ejectment: In a suit for ejectment, ordinarily all the co-landlords are necessary parties.[12] But in eviction suit against a trespasser, one of the co-landlords can file such a suit.[13] In suit for ejectment on the ground of default in payment of rent, a person setting up an oral gift-deed alleged to be executed by the landlord refuted by the latter is not a necessary party.[14] In a collusive suit for ejectment on the ground of default in payment of rent, and sub-letting, the sub-lessee is a necessary and proper party.[15] In an eviction suit filed against a tenant who is missing, the wife and children of the tenant are necessary party.[16] In proceedings for release of the accommodation the sub-lessees in possession of the property on the basis of the lease-deed are necessary parties.[17] In a suit for possession by a tenant who has been ousted from possession, the tenant who has been inducted into premises subsequently is not a necessary party.[18] In a suit for the recovery of arrears of rent all the landlords are not necessary party, as payment of rent to one of the landlords is a valid discharge of the liabilities of the tenant.[19] In a suit for ejectment on the ground of sub-letting the sub-tenant is a necessary party.[20] In a suit for ejectment against wife, husband alleging that he is the real tenant is not a necessary party,[1] in the undermentioned case,[2] however contrary view has been taken.

Suits for partition: In a partition suit brought by sons against their father, a lady manifesting herself as the daughter of the defendant father is

11 *B. Narasimha* v. *Gangaputra Co-op. Housing Society*, A 1984 AP 166.
12 *Jagdish Prasad* v. *Sumitrabai*, 1986 Jab LJ 765.
13 *Jagdish Prasad* v. *Sumitraben*, 1986 Jab LJ 765, 1986 MPLJ 289.
14 *Shafiq Ahmad* v. *Vth Addl. District Judge, Varanasi*, 1988 (2) ARC 329 (All).
15 *Benimadhab Mehrotra* v. *Howrah Flour Mills Ltd*., A 1985 Cal 172 (DB).
16 *Bimla Devi* v. *Dharam Chand*, A 1994 NOC 158 (Delhi.).
17 *Kanhaiya Lal* v. *Prescribed Authority Agra*, 1988 (I) ARC 438 (All).
18 *Chandra Bhan Prasad* v. *Mohan Lal*, A 1987 Cal 322.
19 *Devidutta Agarwalla* v. *Mohanlal Tebriwal*, A 1994 Ori 176; *Sukumari Debi* v. *Ramdas Ganguli*, A 1994 Cal 85.
20 *S. Asia Industries* v. *Sarup Singh*, A 1966 SC 346; *Satish Chand* v. *Bhonrilal*, A 1992 Raj. 75; *Howrah Flour Mills Ltd.*, A 1985 Cal 172.
1 *B.K. Dutta* v. *Nita Madan*, A 1984 Cal 228.
2 *Chanan Lal* v. *Sham Lal Gupta*, 1988 Srinagar Law Journal 114 (J&K).

a necessary party.[3] In a suit for partition, persons who are neither entitled to any share nor interested in the suit property are not necessary party.[4] In a suit for partition under the Mahomedan Law all the co-sharers and the residuary who are entitled to succeed are necessary party, others who under the Mahomedan Law have no right or interest in the suit property are not necessary party.[5] In partition suits all the parties are plaintiffs and defendants and without even one the suit cannot proceed nor the matter be settled.[6] In a suit for partition the purchaser of the property sought to be partitioned unless the sale is challenged is not a necessary party.[7] A transferee can file suit for partition and enforce his right against other coparceners even without joining the transferor coparcener as a party to the suit.[8]

Suits for injunction: In a suit for injunction, only those persons who interfere with the plaintiff's possession are necessary parties.[9]

Suit for Tort : When several persons jointly commit a tort, the party injured may bring a suit against all or any of them, as he likes,[10] and may claim the whole relief from the person sued,[11] but he is not entitled subsequently to bring a separate suit against those whom he had omitted to join.[12] Release of one joint tort-feasor will, however, operate as discharge of all, but if one is exempted on his paying money in full discharge of his liability, the others are not discharged.[13] In a suit for ejectment, against trespasser, however, all persons in possession must be made defendants and there is no distinction in principle in this respect between the cases of trespasser and of tenants. Where the heirs of a deceased defendant in such a suit were not brought on record, it was held that the suit could not

3 *M. Shanmugha Udayar* v. *Sivanandam*, A 1994 Mad 123 (DB).
4 *Monomoyee Barmani* v. *Upeswari Barmani*, A 1994 Gauh 18.
5 *Shaikh Dawood* v. *Mahamoda Begum*, A 1985 AP 321.
6 *Ram Mehar* v. *Surat Singh*, 1989 (I) HLR 628 (P&H).
7 *Parvathamma B.N.* v. *B.M. Nagaraja Setty*, 1988 (2) Karn LJ 387 (Kant).
8 *Indrachand* v. *Pukhraj*, 1989 (I) RLR 497 (Raj).
9 *Om Prakash* v. *Dy. Director of Consolidation, Meerut*, 1986 A LJ 399, 1986 All CJ 103 (All).
10 *Meyappa* v. *Maung*, 12 IC 866, 4 Bur LT 145.
11 *A Subhayya* v. *Verayya*, 42 LW 17, A 1935 Mad 750.
12 *Brinsmead* v. *Harrison*, ILR 7 CP 547; *Rahimbhoy* v. *Turner*, 14 B 416.
13 *Basharat* v. *Hiralal*, 138 IC 77, A 1932 All 401, 1932 ALJ 497.

proceed unless it was shown that the heirs were not in possession.[14] Similarly, where two of the trespassers were minors and no guardian having been appointed for them, the suit against them was dismissed, and was held that the suit could not be decreed against the remaining defendants.[15]

Mis-joinder and Non-joinder : When a necessary party is omitted, the defect is called *non-joinder of plaintiffs* or *non-joinder of defendants,* as the case may be. When a person is joined who should not have been joined, i.e., his joinder violates against the rules given above, the defect is called *misjoinder of plaintiffs* or *misjoinder of defendants,* as the case may be. Any objection on the ground of non-joinder or misjoinder must be taken at the earliest opportunity, and, in all cases where issues are settled, at or before such settlement, and any objection not so taken is deemed to be waived.[16] If a defendant is allowed to file an additional written statement, he may take the objection then.[17] A plea as to non-joinder of necessary party can legitimately be taken in written statement, cannot be raised and decided in an application for grant of temporary injunction.[18] If, however, the objection arises for the first time after settlement of issues, e.g., when a defendant dies and the plaintiff has substituted only two out of his three heirs, it can be raised when it arises.

Consequence of Such Defect: The result of such defect is not always fatal, and a suit cannot be dismissed merely on the ground of mis-joinder or non-joinder of parties, unless there is anything to the contrary in any substantive law or rules. The court may deal with the matter in controversy so far as regards the rights and interests of the parties actually before it,[19] unless it is not possible for the court to determine the suit, e.g., if in a suit for ejectment of several persons jointly in wrongful possession, one of the persons is not impleaded as a

14 *Arunadoya* v. *Muhammad Ali*, 106 IC 260, 46 CLJ 433; *Shyam Sunder Bhartiya* v. *Gouri Shanker Bhartiya*, A 1980 Cal 230.

15 *Mokshud* v. *Khedu*, 33 CWN 742, A 1929 Cal 669, 124 IC 75.

16 O.1, R.13; *Abdul Cader* v. *S.L. Ahamado*, 160 IC 711, A 1936 PC 51.

17 *Shri Raja* v. *Shri Raja*, 62 MLJ 154, 1932 MWN 494, A 1932 Mad 583, 137 IC 274.

18 *Mahaveer Dasa* v. *Ganeshmal Jeevraj*, A 1992 Raj 29.

19 O.1, R.9; *Abdul Cader* v. *S.L. Ahamado*, 160 IC 711, A 1936 PC 51; *Taseruddin* v. *Salimuddin*, A 1972 Gau 71.

defendant or in an administration suit a personal representative of the deceased is omitted,[20] or in a partnership accounts suit, a partner is omitted,[1] or all trustees are not impleaded as required by O.31, R.2.[2] The court is also entitled to take notice of events happening after the filing of the suit, e.g., if a suit is brought by one of the two persons jointly interested and the other dies during the pendency of the suit, the court should not dismiss the suit for non-joinder but should decree it.[3] If the defect is pointed out to the plaintiff from the very outset and he has had ample opportunity of remedying it, which he fails to avail of, the suit may be dismissed,[4] though the court may instead itself order the party to be impleaded rather than let the plaintiff suffer for the mistake of his counsel.[5] A proviso has been added to O.1, R.9, by the Central (Amendment) Act, 104 of 1976, the effect of which is that where a necessary party has been omitted from being joined and the plaintiff does not obtain leave to join him, the suit ought to be dismissed. In view of the new proviso, if in a suit necessary party is not impleaded, the suit shall be dismissed not for the reason of non-joinder or mis-joinder of parties but because no effective order can be passed and consequently no relief can be granted to the parties on record.[6] The non-joinder of necessary parties is fatal to the suit.[7]

O.34, R.1, which lays down who are the necessary parties to a mortgage suit, is made expressly subject to the other provisions of the Code,[8] including O.1, R.9. If the court could decide the suit as between

20 *Tuman* v. *Che Son*, 63 MLJ 369, 136 IC 632, A 1932 PC 317.

1 *Amir Chand* v. *Raoji*, 58 MLJ 613, 130 IC 453, A 1930 Mad 714.

2 *Ram Gulam* v. *Shyam Sarup*, 1933 ALJ 1917, 55 A 687.

3 *Sarnammal* v. *Thangavelu*, A 1940 Mad 412, 190 IC 657, 1940 MLJ 240.

4 *Naba Kumar* v. *Radha Shyam*, 54 CLJ 274, 134 IC 645, 1931 ALJ 797, 35 CWN 677, A 1931 PC 229, 61 MLJ 294; *Raghubar* v. *Firm of Piarelal*, 145 IC 178, A 1933 Lah 93; *Probodh Lal* v. *Nilratan*, A 1936 Cal 193; *C Pillai* v. *D.M. Devashyamo*, A 1956 Tr. Co. 181 (FB).

5 *State of Assam* v. *Basanta*, A 1985 Gau 13.

6 *Chuba Temsu Ao* v. *Nangponger*, A 1994 Gau 110.

7 *Chuba Temsu Ao* v. *Nangponger*, A 1994 Gau 110; *Nalla Venkateshwarlu* v. *Priso Pullamma*, A 1994 AP 87; *Gauhati University* v. *Bhabendra Thakuria*, (1989) 1 Gauhati LR 370 (Gauh); *Gopi* v. *Mohd. Hussain*, A 1993 MP 21; *Umma Saghir* v. *District Judge Gorakhpur*, A 1990 All 100; *Lakhana Nayak* v. *Basudev Swamy*, A 1991 Orissa 33.

8 *Lasadin* v. *Mahomedali*, A 1940 Oudh 235, 186 IC 540, 1940 OWN 209.

the parties before it, it could not, under the pre-amendment provision, dismiss it, but if it was not possible to pass any decree between such parties, the suit was to be dismissed.[9] If, therefore, a prior mortgagee sued without joining a subsequent mortgagee, the whole suit could not be dismissed but only so much as related to property affected by the subsequent mortgage.[10] Similarly, if a mortgagee impleaded only some of the heirs of a deceased mortgagor, sale could be ordered of the shares of the heirs impleaded,[11] or court could implead those omitted,[12] and if some of the heirs of a deceased mortgagee were omitted, a decree could be passed for the shares of the persons suing.[13] The decree could be passed in respect of the entire amount due and need not have been for proportionate amount only.[14] But in such cases the right of the mortgagor omitted would remain unaffected and could be enforced against the plaintiff even if he purchased the property in execution of the decree.[15] In a case, where some heirs were omitted and were joined after limitation, the Oudh Chief Court decreed the entire suit, holding that section 22 of the Limitation Act, 1908, did not bar the suit as the suit was against property and no relief was sought against the defendants personally.[16] Now see section 21, with proviso of new Limitation Act, 1963.

The Allahabad High Court[17] following Madras[18] and Bombay,[19] has held that where the court appoints one of the heirs of a deceased respondent as his legal representative, he must be deemed to represent the other heirs also and a decree passed against him will be binding on others also, even if the deceased is a Muslim. A decree for redemption can be given on the

9 *Narayan* v. *Surajbhan*, A 1937 Pat 414, 169 IC 897.

10 *Alam Singh* v. *Gokul Singh*, 35 A 484, 21 IC 271.

11 *Kherodamorji* v. *Habib*, 29 CWN 51, 82 IC 638; contra *Gurcharan* v. *Ram Chandra*, A 1942 Oudh 197, 1941 OWN 1297, in which it was held that the whole suit should be dismissed.

12 *Satyadeva* v. *Tribeni Pd.*, 161 IC 579, A 1936 Pat 153.

13 *Mohan* v. *Hem Chandra*, 105 IC 287, A 1931 Cal 648.

14 *Mohammad* v. *Champamani*, 179 IC 549, A 1939 Pat 49.

15 *Jasraj* v. *Sugrabai*, A 1940 Sindh 195.

16 *Gurcharan* v. *Ram Chandra*, 1941 OWN 1279, A 1942 Oudh 197.

17 *Sheikh Mohammad* v. *Taj Narain*, A 1942 All 324.

18 *Kadir Mohideen* v. *Muthu Krishna*, 26 Mad 230.

19 *Johrabi* v. *Bismillahi*, A 1924 Bom 420, 80 IC 758, see also, *Virchand* v. *Kondu*, 39 Bom 729.

suit of one mortgagor, though others are not impleaded, as one mortgagor can redeem the mortgage. In a mortgagee's suit no decree can be passed if all the mortgagees are not on record.[20] Even if all the mortgagees are not before the Court in a suit filed by the mortgagor for redemption of property, but the mortgagor is ready and willing to pay the entire amount due on the mortgage to such of the mortgagee as are before the Court and gives up his right under the mortgage as against those mortgagees who are not before the Court, the Court can pass a decree for redemption directing that the entire mortgaged amount should be paid to the mortgagees who are actually before Court.[1] In a suit for declaration by the mortgagee that transferee from mortgagor's son was not owner of the disputed property, the mortgagor's son was not impleaded. Suit against the transferee alone was held to be not properly framed.[2] A decree can be passed even if some co-mortgagees are impleaded as defendants beyond limitation,[3] provided the earlier omission was *bona fide*. The contrary view,[4] can not hold good in view of section 21 of the Limitation Act, 1963. Where, on failure of plaintiff's title claimed as mortgagee's adopted son, the mortgagee's heirs were impleaded, one as plaintiff and two as defendants in appeal, and a decree was passed, the Supreme Court held that the new parties were added to press their own rights and section 22, Limitation Act was attracted to such a case of addition of plaintiff under O.1, R.10. Also that O.1, R.10, allowed addition as plaintiff only and not some as plaintiffs and some as defendants.[5]

(On the question of limitation, see however, discussion under heading:- Impleadment and Limitation *post)*

Adding, Substituting and Striking out Parties : The proper course when such defect is detected is to apply for removal of the defect by adding any person omitted,[6] by substituting the right person for the wrong

20 *Girdhar* v. *Motilal*, 1940 NLJ 151; *Ram Pd.* v. *Vijay Kumar*, A 1967 SC 278.

1 *Chhaganlal Keshavalal* v. *Patel Narandas*, A 1982 SC 121.

2 *Jugraj Singh* v. *Jaswant Singh*, A 1971 SC 761.

3 *Baldeo Prasad* v. *Bholanath*, 52 All 134, 121 IC 106, A 1929All 941; *Umesh* v. *Hemanga*, 60 C 87, 143 IC 315, A 1933 Cal 325.

4 *Adireppa* v. *Rechappa*, A 1948 Bom 211, 50 BLR 30, 34 CLR 113; *Govind* v. *Jamaluddin*, 60 C 777, 145 IC 259, A 1933 Cal 64.

5 *Ram Pd.* v. *Vijay Kumar*, A 1967 SC 278.

6 *Capt. Daniels* v. *GDF Trust*, A 1959 All 579.

person, or by striking off the name of any party improperly joined, and the court has a very wide power to order such amendment on such terms as may appear just at any stage of the proceedings,[7] even after a preliminary decree for partition[8] or sale of mortgaged property[9] has been passed. After preliminary decree in a partition suit, the alienee from a coparcener was allowed to be added as a party, without right to reopen the preliminary decree.[10] After an *ex parte* decree has been passed, a person who was a necessary party can be added and allowed to have the *ex parte* decree set aside.[11] An Appellate Court can also exercise this power. Where in a suit on a contract the defendant proved that a third person was also a party to the contract alongwith the plaintiff, it was held that the suit should not have been dismissed but the court should have impleaded that third person *suo motu*.[12]

When the original plaintiff was found not entitled to maintain a suit, transposition of a defendant as plaintiff was allowed.[13] In a suit for specific performance of contract, where the plaintiff withdraws from the suit, the defendant claiming vested right in the property on the basis of the sale-deed may be transposed as plaintiff.[14] In a suit under section 92 C.P.C. the plaintiffs withdrawing from the suit may be transposed as defendants.[15] Where the plaintiffs withdraw the representative suit under O.1, R.8, the Court on the application moved by the contesting defendants transpose them as plaintiffs and the plaintiffs as defendants.[16] A co-sharer in the suit

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7 O.1, R.10 (2).

8 *Jotindra* v. *Bejoy*, 32 C 483; *Lakshmi Chand* v. *Kuchubhai*, 35 Bom 393, 13 BLR 517, 11 IC 559; *Krishnaji* v. *Motilal*, 122 IC 66, A 1929 Bom 337 DB; *Daw Aye* v. *U.Kwe*, 154 IC 465, A 1935 Rang 23; *Madadi Narasimha Reddy* v. *Madadi Ram Chandra Reddy*, 1975 AnWR 227; *Ramadar Appalla Narsingha Rao* v. *Chunduru Sarada*, A 1976 AP 226.

9 *Kunja Behari* v. *Bessudhar*, (1941) 7 Cutt LT 49.

10 *Manubhai* v. *Shiv Prasad*, 1979 Mah LJ 252.

11 *Rameshwar* v. *Th. Jeban Narayan Singh*, 166 IC 794, A 1937 Pat 49.

12 *Sheomurat* v. *Jhabbumal*, 1930 ALJ 247, 122 IC 597; see also, *Paras Ram* v. *Epling Singhji*, A 1985 Raj 236 (on O.41, R.20).

13 *Santaram* v. *Trust of India*, A 1945 Bom 11.

14 *Md. Muzahid* v. *John Wilson Zedak*, A 1989 Pat 2.

15 *Anand Prakash* v. *Sushil Kumar*, A 1987 All 296.

16 *B.Pattabhirmayya* v. *B.Gopalakrishnayya*, A 1986 AP 270 (DB).

property arrayed as a defendant can be transposed as plaintiff.[17] A defendant can be transposed as plaintiff even if he has remained *ex parte*.[18] In a suit for partition where the parties are Christians, on the death of the plaintiff who has not left any will, the defendant can be transposed as plaintiff.[19]

The power of transposition of parties can be exercised at any stage of the proceedings, the question of limitation is not involved in such cases.[20] If the conduct of the plaintiff has not been fair and straight forward and has been extremely negligent, e.g., when he persisted in two courts in not adding a party even when he was given an opportunity to do so, court may dismiss the suit.[1] Where in a suit against the railway administration, the defendant was described as, "Agent East Indian Railway", and no specific objection was taken at the trial and the suit was defended on merits, the defect in the title was allowed to be amended in second appeal.[2] Similarly, when the defendant was described as "firm S, through C.L. Manager," an amendment by the substitution of C.L. as sole proprietor and manager of the firm S was allowed,[3] but when a firm was sued for a debt taken by one of the partners A and another partner B contested the suit on the ground that A had no authority to take loans for the firm, the Court rejected an application for amendment by substitution of the name of A only for that of the firm.[4] Where a suit had been filed against K and S, on discovery that S had died before filing the suit, his heirs may be added,[5] but where the sole plaintiff or the sole defendant was dead before the institution of the suit the plaint is a nullity and cannot be amended.[6]

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17 *Nishabar Singh* v. *Local Gurdwara Committee Manju Saheb*, A 1986 P&H 402.

18 *Madhavan Pillai* v. *Vasu Pillai*, (1988) 2 Ker LJ 882; 1989 (I) KLT 168 (Ker).

19 *John Baptis Lobo* v. *Baniface Felix Lao*, (1989) 2 Karn LJ 42 (Kant) (DB).

20 *Reazuddin Ahmed* v. *Salema Nahar*, 1989 (I) Gauh LR 230 (Gauh).

1 *Narayanan* v. *Chekunni*, 170 IC 242, A 1937 Mad 520.

2 *Gopi Ram* v. *Agent East India Railway*, 30 CWN 209, 94 IC 762, A 1926 Cal 612 (DB).

3 *Kishen Singh Sant Ram* v. *Salig Ram Bhagat Ram*, 1938 Lah 718.

4 *Ahmad Moosa* v. *Lila Ram*, A 1942 Sindh 93.

5 *Rangrup* v. *Kashinath*, A 1947 Nag 73; *Raju* v. *D.D.Italia*, A 1961 AP 239; *Firm Palamal* v. *Fauja Singh*, A 1926 Lah 153, 89 IC 661; *Gordhandas* v. *Rijibai*, 168 IC 860, A 1937 Sind 47; *Joginder Singh* v. *Krishna Lal*, A 1977 P&H 180.

6 *Mt. Bondu* v. *Motichand*, A 1923 Lah 652; *Noor Bhoy* v. *Secretary of State*, 168

O.1, R.10(2) confers wide powers on the Court in the matter of striking out or adding parties. The court may, at any stage of the proceedings, either upon or without the application of either of the parties, and on such terms as may appear to the court to be just, order the name of any party improperly joined, whether as a plaintiff or a defendant, be struck out and that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectively and completely to adjudicate upon every question involved in the suit be impleaded. The power thus conferred on the court is of great importance, since if the plaintiff is permitted as a rule to choose his opponents he may leave out the real owner or interested person, implead a person of his own choice and get a collusive decree which would have become final when the real owner comes to know about it and will create an ugly situation.[7]

The power can be exercised by the court even of its own motion, and this is done particularly in respect of, 'proper parties', *i.e.*, when the presence of a person (though not strictly a "necessary party") is considered expedient in order to enable the court effectually and completely to adjudicate upon, and settle all the questions involved in the suit.[8] Where the addition of a party is necessary to avoid the possibility of multiplicity of judicial proceedings such a party should be added under O.1, R.10.[9] The expression 'proper party' must be given a wide interpretation, and even questions between the parties to the suit and a stranger with regard to the subject matter of the suit may be taken into account.[10] In such cases the power can be exercised even in the face of the plaintiff's opposition.[11] A

IC 748, A 1937 Sind 92; *C.Raju* v. *D.D.Italia*, A 1961 AP 239; *Calicut Municipal Council* v. *Kunlupathrama*, A 1933 Mad 854, 1933 MWN 644, 143 IC 596; *Hazarimal* v. *Shriram*, A 1934 Nag 55, 148 IC 241; *Mahtab* v. *Amulya*, 24 IC 112; *Ramrup* v. *Kashinath*, A 1947 Nag 73; *Cuttack Municipality* v. *Shyam Sunder Behera*, A 1977 Ori 137; *Joginder Singh* v. *Krishna Lal*, A 1977 P&H 180; see also, *Hiralal* v. *Kalinath*, A 1962 SC 199 (para 4).

7 *Kissan Uchhatar* v. *3rd District Deoria*, A 1989 All 168.

8 *Bheemavarap Venkateswara Reddy* v. *Naga Rami Reddy*, (1971) 2 APLJ 55.

9 *Tera Tea Co. Pvt. Ltd.* v. *Kumkum Mittal*, A 1994 Cal 191 (DB).

10 *G.M.V.Krishnamachari* v. *M.O.Dhanalakshmi*, A 1968 Mad 142.

11 *Secretary of State* v. *Durugesa*, 118 IC 780, A 1929 Mad 443; *Meyappa* v. *Seerthachi*, 171 IC 145, A 1937 Mad 200.

'*necessary party*', as contra-distinguished from a '*proper party*', means a party 'necessary for the constitution of a suit and whose non-joinder affects the merits of the case and jurisdiction of the court and without whom no effective decree can be passed.[12] But a party should not be added if the addition would result in the introduction of unnecessarily complex questions foreign to the issues in the case. Moreover a suit cannot be dismissed merely for failure to join a proper party as distinguished from a necessary party, and section 99 C.P.C. can also be applied in a suitable case.[13] Similarly, where a third person alleged that he had acquired an interest in the property in suit under a compromise between the parties, and the parties denied the compromise, he was not impleaded.[14] But in a partition suit, a person claiming that the plaintiff had entered into an agreement for sale of certain properties with him was made a defendant.[15] Where defendant in a suit for accounts pleaded that he had settled with plaintiff's brother who was also a partner in plaintiff's firm, the plaintiff was allowed to implead the brother.[16] Where in a suit on a pronote by an endorsee, the endorser alleged that he had endorsed the pronote only for collection, he was allowed to be made a defendant and not a co-plaintiff.[17] The co-wife and step son were impleaded in a suit for declaration of status and recovery of *kharch-i-pandan* by a wife against her husband when the husband admitted the claim but the co-wife and step son wanted to contest it.[18]

Normally a triangular contest is not contemplated by Rule 10, and a person whose interest is opposed to that of the plaintiff as well as to the defendant should not be added as a party.[19] In a suit by a landlord against his tenant for ejectment where defendant pleaded that the land belonged

12 *Udit Narain* v. *Board of Revenue*, A 1963 SC 786; *Devi Das* v. *Shushailappa*, A 1961 SC 1277; *Kali Rai* v. *Tulsi Rai*, 93 IC 932, 4 Pat 723, A 1926 Pat 207 (DB); *Hari Ram* v. *Central Government*, A 1941 Lah 120.

13 *Sahasaheb* v. *Sadashiva*, 43 Bom 575; *Sital Prasad* v. *Asho Singh*, A 1922 Pat 651, 69 IC 677.

14 *Meyappa* v. *Seethachi*, 171 IC 145, A 1937 Mad 200.

15 *G.M.V. Krihnamachari* v. *M.O.Dhanalakshmi*, A 1968 Mad 142

16 *Har Prasad* v. *Shankar Lal*, A 1933 All 957.

17 *M.R.Nazareth* v. *Peroz Shaw*, A 1934 Sindh 182.

18 *Razia Begum* v. *Anwar Begum*, A 1958 SC 886.

19 *Chidambaram* v. *Subramaniam*, 105 IC 114, 53 MLJ 269, A 1927 Mad 834; *Devendra* v. *Batasibai*, A 1934 Nag 228, 148 IC 720.

to government, it was held that it was not proper to implead government.[20] A third party ought not to be made a party to a suit by landlord for rent [1] or ejectment [2] so as to convert it into one for determination of title to the property between rival claimants of ownership. The remedy of such rival claimant lies by way of separate suit. In a suit for specific performance of a contract, likewise, a rival claimant of ownership cannot claim to be impleaded.[3] In an injunction suit also a stranger cannot claim impleadment as the judgment in such a suit is not judgement *in rem*.[4] But even in a suit between landlord and tenant where the tenant pleaded that he had wrongly attorned in favour of the plaintiff in ignorance of the fact that the latter had no title, a stranger claiming to be co-owner was ordered to be impleaded on his application.[5]

If the object of an attaching creditor is not to be allowed to redeem the mortgage, but to challenge the mortgage itself and a compromise arrived at in the redemption suit between the parties to it, he would not be impleaded.[6] But even a person not exactly a proper party may be added to avoid multiplicity of suits, e.g., in an administration suit, an alleged heir,[7] but not a person outside the family though in possession of part of the property.[8] So in a suit for rent against a recorded tenant, the transferee of the holding was allowed to be made a defendant though this involved determination of the question of the transferability of the holding.[9] In a suit for property purchased by the plaintiff, the seller was also added as a co-plaintiff, but he afterwards denied that the sale was genuine. The court ordered his transposition to the array of defendants for the purpose of finally deciding the contest between him and the purchaser also.[10] The

20 *Subramanya* v. *Anantha*, A 1932 Mad 688, 139 IC 679.

1 *Pravat Chandra* v. *Amulya Chandra*, A 1927 Cal 340, 45 CLJ 146 (DB).

2 *Balwant Raj* v. *Gian Singh*, A 1978 J&K 84; *Prabha Sexena* v. *II Addl. District Judge, Kanpur*, 1989 (2) ARC 197 (All).

3 *Raj K.Mehra* v. *Anjili*, A 1981 Del 237.

4 *Khushi Ram* v. *Lalman*, A 1983 Del 78.

5 *Satish Chandra* v. *Sarvesh Chandra*, A 1984 Del 409.

6 *Bruel & Co.* v. *Kesheoras*, A 1926 Nag 67 (DB).

7 *Maung Tuj* v. *Maung Po*, 103 IC 22 Rang.

8 *Ah Kyan Sin* v. *Yeo Ah Gwan*, A 1937 Rang 497; contra, *Suryanarain* v. *Anasyamina*, A 1963 AP 298.

9 *Sarju* v. *Bibi Bersatan*, 103 IC 544, A 1927 Pat 242, 8 PLJ 305.

10 *Vanjiappa* v. *Annamalai*, A 1940 Mad 69.

court cannot refuse a defendant to be made a plaintiff on the ground that it would increase the valuation of the suit and take it out of its jurisdiction.[11] The court has no power to join a person as a co-plaintiff who is a stranger and has no personal interest in any of the reliefs claimed by the plaintiff.[12] If the court considers it necessary for giving effect to the rights of parties, it can add even legal representatives of a party against whom the suit has abated.[13] But the mere fact that a person might be affected by the result of a suit, e.g., a financier who is promised a share on the success of the suit, is no ground for impleading him as a co-plaintiff.[14]

No person can be added as a plaintiff without his consent.[15] If he does not agree to be made a plaintiff, he should be added as a *proforma* defendant. Nor can anyone be added as a plaintiff without the consent of the existing plaintiff.[16] The court should consider whether a person is a necessary or a proper party before calling him to be impleaded and exposing him to the travails of litigation.[17]

The court also has power to order the substitution of another person for a person appearing as a plaintiff, or to order the addition of another person also as plaintiff provided it is satisfied that the suit was instituted through *a bona fide* mistake in a name of a wrong person as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, and that the amendment is necessary for a determination of the real matter in dispute.[18] But these conditions are necessary and must be satisfied. When a person brings a suit alleging that he has the right to sue and it is found that he has no such right, the court would not be justified in directing amendment to enable the proper party to sue.[19] For instance, in a suit by a trustee against a co-trustee which is found to be time-barred,

11 *Raj Kishore* v. *Alam*, A 1926 Pat 28, 90 IC 82.
12 *Fakir Mohammed* v. *Agha Khan*, 120 IC 571, A 1930 Sindh 73.
13 *Mohammadally* v. *Safiabai*, A 1940 PC 215.
14 *Kailash* v. *Ranchani*, 58 MLJ 240.
15 *Narayanswami* v. *Subharamulu*, 68 MLJ 236, A 1935 Mad 102, 41 MLW 126.
16 *Gunendra Kumar* v. *Dura Steamship Ltd.*, A 1989 Cal 398; *Pravat Chandra* v. *Amulya Chandra*, 45 CLJ 146, A 1927 Cal 340 (DB).
17 *Pappa Ammel* v. *Pandiyan Bank Ltd.*, A 1963 Mad 480; *Ram Gopal Sah* v. *Dhirendra Nath*, A 1981 Pat 298.
18 O.1, R.10(1).
19 *Samanna* v. *Kadathur*, 93 IC 305, A 1926 Mad 577.

the plaintiff cannot add a beneficiary as a plaintiff in order to take advantage of section 10, Limitation Act, 1908.[1] But where the suit is not barred, a court has power to substitute a right person for a wrong person.[2] In a case of partnership business or joint family business, the Supreme Court allowed amendment on the ground of misdescription.[3]

If a suit is filed by an assignee of a bond and the assignment turns out to be void, the assignor can be substituted as plaintiff.[4] When a person who had wrongly filed a suit made an application divesting himself of any claim and prayed for the substitution of another person who had a cause of action admitting that he himself had none, it was held that the case fell under Rule 10.[5] If a suit is filed by a person as minor through *a bona fide* mistake, he can be allowed to continue the suit as major on discovery of the mistake even if limitation has expired.[6] This power can be exercised even in second appeal.[7] The court has no power to add as plaintiff a person whose interest is against the existing plaintiff, though he may be added as a defendant if his presence is considered necessary.[8]

Courts have inherent power to pass necessary orders for addition or substitution of parties,[9] though ordinarily the court will not add a party particularly a defendant without the concurrence of the plaintiff.[10] When a father, to whose share a pronote executed in the name of the son was allotted on partition, brought a suit impleading the son also as a defendant, it was held that the suit should not be allowed to fail for want of an

1 *Jamna Das* v. *Damodar*, 29 BLR 418, 103 IC 225, A 1927 Bom 424.

2 *Krishnaji* v. *Harimaraddi*, 6 BLR 314, 54 B 536, A 1927 Bom 385.

3 *A. Purushottam & Co.* v. *Mani Pal & Sons*, A 1961 SC 325; *Jai Jai Ram Manohar Lal* v. *National Building Material Supply*, A 1969 SC 1267; *Ram Nath* v. *Kedar*, A 1970 All 406.

4 *Sitla Bux Singh* v. *Mahabir Pd.*, A 1936 Oudh 257, 162 IC 229.

5 *Municipal Committee* v. *Imran Ali*, A 1934 Nag 159, 150 IC 895.

6 *Inderpal* v. *Bhagwati*, 1940 OWN 100; *Ghasi* v. *Mangi*, A 1932 Lah 322, 132 IC 710; *Narayan* v. *Dulal*, 100 IC 469.

7 *Radhaballabh* v. *Raghunath*, 180 IC 833, A 1939 Pat 397; *Nur Mohammad* v. *Jaimulabdin*, A 1940 All 399, 190 IC 384.

8 *Vanjiappa* v. *Annamalai*, A 1940 Mad 69; *Daulat Ram* v. *Rama Kant*, 1971 RLR 658.

9 *Jaimala Kr.* v. *Collector of Saharanpur*, 1933 ALJ 1512.

10 *Virbhadrappa* v. *Shekabai*, A 1939 Bom 188, 182 IC 539; *Banarsi Das Durga Pd.* v. *Panna Lal Oswal*, ILR 1968-2 Punj 309.

endorsement by the son but the son should be allowed to be made a co-plaintiff.[11] But where a person was left out not by mistake but by gross negligence, he was not allowed to be impleaded.[12]

Intervenor : Besides acting on the motion of a party to the suit or on its own motion, the court can act under this rule on the application of a third person who wishes to be impleaded as a party to the case. Such a person is called "intervenor". If the intervenor is a necessary party to the suit, he must be joined, but if he is not a necessary party, the court has to exercise its discretion in making him a party and in doing so is guided by the same considerations which arise when a plaintiff applies for addition of a new person as defendant and which have been discussed above. An intervenor can be impleaded as a defendant (though not as plaintiff) even against the plaintiff's wish where there is one subject-matter out of which several disputes arise and the main evidence on the issues raised by the intervenor will be the same, but if serious embarrassment or inconvenience is likely to be caused to the plaintiff by addition of a third party, the court may refuse to implead him. An intervenor will generally not be impleaded where he is not directly interested in the issue between the existing parties but is only indirectly affected or where he claims adversely to both the plaintiff and defendant. It is not open to the court to examine the intervenor's case on merits at this stage, and more so where his defence is the same as that of existing defendants.[13]

Impleadment of Parties and Limitation : *Position under old section 22:* When a new plaintiff or a defendant was added, or substituted, the date of his addition or substitution was, under section 22 of the old Limitation Act, deemed to be the date of institution, as regards that person, for the purpose of limitation, so that if a defendant was added after the expiry of limitation the suit *against him* was barred. It was held that the date of addition meant the date on which application is made for his addition and not that on which the court passed its order on it.[14] Sub-rule (5) of R.10 of O.1 provides that subject to the provisions of the said section 22 the proceedings as against the person so added as defendant shall be

11 *Virappa* v. *Mahadevappa*, A 1934 Bom 356, 36 BLR 807.

12 *Ghulam* v. *Lachman*, 148 IC 329, A 1934 Lah 36.

13 *Mukhtiyar* v. *Pannalal*, A 1985 MP 122.

14 *Praful* v. *Rao Gajendra*, A 1945 Nag 57.

deemed to have begun only on the service of the summons.[15] This rule would apply even if order is passed by the court *suo motu*.[16] Thus a suit on a contract in which there are several joint promisees, could not succeed unless brought by all the promisees and if any one was left out he could not be impleaded by amendment,[17] and if he was impleaded after the period of limitation, the suit was to be dismissed.[18] A suit by some of the heirs of a deceased partner against the other partners for account was dismissed when the other heirs were not joined within limitation.[19] A suit on a mortgage by the assignee of one mortgagee without joining other mortgagees within the period of limitation was also held liable to fail for the same reason.[20]

But no question of limitation could arise if, by the amendment, no really new person was brought on the record and only his description was changed. The test in such cases was whether one person or legal entity was substituted for another or the person or legal entity remains the same and only his name or description is altered.[1] For example, if a person has sued without saying that he was suing as a *shebait*, an amendment to show that he had sued in that representative capacity had not the effect of adding a new plaintiff.[2] Similarly, where a joint family sued or was sued in its business name (as firm so and so) but afterwards the members of the family were substituted either on the defendant's objection or on discovery that O.30 did not apply to a firm owned by a joint family (which is only one person in the eye of law), it was only a correction of a misdescription and no question of limitation could arise.[3] However, where a member of a joint family sued in his individual capacity, he was not allowed after expiry of limitation to amend the plaint so as to show that he was suing as manager

15 *Indu Bhushan* v. *Hate Ram*, A 1972 Pat 229.

16 *Ram Kinkar* v. *Akhil*, 30 C 519, 11 CWN 350; *Maung Tun Thein* v. *Maung Sin*, 170 IC 105, A 1937 Rang 124.

17 *Tipan Prasad* v. *Secretary of State*, 154 IC 103, A 1935 Pat 86.

18 *Ram Dayal* v. *Jammenjoy*, 14 C 791.

19 *Abdul Hawk* v. *Tumulari*, 100 IC 616, 52 MLJ 318.

20 *Giris Chandra* v. *Ram Saran*, 125 IC 190, A 1929 Cal 591 (DB); *Bhagela* v. *Abdul Rahman*, 36 IC 77, A 1916 Pat 411.

1 *Mangharam* v. *Haji*, 182 IC 881, A 1939 Sindh 172.

2 *Kuarmani* v. *Wasif*, 28 IC 881, 19 CWN 1193.

3 *Ram Prasad Shivlal* v. *Sri Nivas*, A 1925 Bom 527 (DB).

of the joint family.[4] Similarly, where a suit for declaration of invalidity of an assessment was brought against the Chairman, instead of the Municipal Commissioner as required by section 15, Bengal Municipal Act, but the main relief sought was against the Corporation and not against the Chairman, it was held that it was a case of misdescription and section 22, Limitation Act, 1908, did not apply to the amendment.[5] When a person filed a suit but after the limitation had expired he was allowed to amend the plaint so as to make it appear that it was instituted on behalf of a company, there was no case of adding a new plaintiff.[6] For the same reason in a suit instituted by a next friend of a minor, when it was discovered that he was major, he was allowed to appear as major even after limitation.[7] But this could be done only if the plaintiff was under a *bona fide* mistake and not where he was found to be grossly careless,[8] or to have instituted a suit deliberately as minor, as when he instituted the suit for setting aside a decree on the ground that he was minor.[9]

Where a party is already on the record, an amendment which merely alters the capacity in which he has been impleaded does not involve an addition of parties. Therefore, an amendment of the plaint by which a suit is converted into a representative suit does not involve an addition of a fresh party.[10] Where the plaint contains necessary averments that the suit is laid in the general interest of all Muslims and the persons sued are also sued in the general interest of the Hindu Community, an application for amendment seeking permission under O.1, R.8 did not introduce fresh parties & no question of limitation arises.[11] A suit was filed by the secretary of an unregistered association. Defect of capacity to sue stood removed by amendment by making it a representative suit.[12] Where a suit was filed in the name of the firm by partners doing business outside India, the names

4 *Ramchandra* v. *Kandaswami*, 1949 Mad 416, (1948) 2 MLJ 577, 1948 MWN 580.
5 *Municipal Commissioner* v. *Gangamani*, A 1940 Cal 153, see also, *Khadi & Village Industries Commission* v. *Sudhansu Shekhar Banerjee*, A 1973 Cal 534.
6 *Muthu Krishna* v. *Rajaram*, 33 IC 357, 3 MLJ 5.
7 *Narayan* v. *Dulal*, 100 IC 469; *Inderpal* v. *Bhagwati*, 1940 OWN 1007.
8 *Ghasi* v. *Manga*, A 1932 Lah 322, 132 IC 710.
9 *Sami Nandu* v. *Katha*, A 1940 Mad 522, 1940 MWN 500.
10 *Seth Nardaramdas* v. *Zuleka Bidi*, A 1943 Mad 531, 1943 MWN 304.
11 *Ahamadullah* v. *Ramasamy Udayar*, 1999 (I) LW 289.
12 *Saran Club* v. *C.T. Lodge*, A 1974 Pat 158.

of the partners were substituted for the name of the firm.[13] Where an unregistered and unincorporated club sued in its own name and later wanted to substitute the names of its members as plaintiffs, it was held that the amendment could not be allowed as it was not a case of misdescription.[14] Where the Receiver of a firm had sued in his own name and later wanted the title to be amended by making the firm suing through him, it was held to be a case of wrong description and amendment was allowed.[15] When, however, a suit was brought in the name of a firm and was found to be not maintainable under section 69 of the Partnership Act, as the firm had not been registered, an amendment cannot be permitted after subsequent registration of the firm so as to treat the suit as instituted after date of the amendment.[16] But where a suit can be maintained without joining certain persons, who are added for the benefit of the defendant only, no question of limitation arises,[17] e.g., where the manager of a joint family sued on a promissory note in his name and other members of the family were added as plaintiffs for the defendant's protection, after the period of limitation, the suit was decreed.[18]

Similarly, the title of a suit was allowed to be altered from "The Agent, East Indian Railway" into "The East Indian Railway Administration through the Agent", even after the period of limitation, on the ground that the reading of the plaint showed that the suit was directed against the Railway Administration and not against the Agent.[19] Likewise, a plaintiff who had originally sued in his individual name was permitted to amend the plaint so as to sue as proprietor of Hindu Joint Family business, and it was held that as the name was merely a misdescription no question of

13 *Purshottam* v. *Mannilal & Sons*, A 1961 SC 325, overruling, *Vyankatesh Oil Mill Co.* v. *Vehmahomed*, A 1928 Bom 191, 30 BLR 107.

14 *Rajendra* v. *R C Turf Club*, A 1964 Cal 57.

15 *Venkata Mallayya* v. *T. Ramaswami Co.*, A 1964 SC 818.

16 *Subramania* v. *East Asiatic Co. Ltd.*, 165 IC 939 (2), A 1936 Mad 991; *Ponnuchami* v. *Muthusami*, A 1942 Mad 252; *Govindmal* v. *Kunj Behari*, A 1954 Bom 364; *Firm Dannal* v. *Firm Babu Ram*, A 1936 All 3; *J.C.S.J Mills* v. *K.L. Sons*, A 1960 J&K 101(FB); *Union of India* v. *Durga Dutt*, 1961 Assam 2; *Dwijendra Nath* v. *Govind Chandra*, A 1953 Cal 497.

17 *Pateshri Pratap* v. *Rudra Narain*, 32 A 241, 6 IC 981 PC.

18 *Kishen Prasad* v. *Har Narain*, 33 A 272, 9 IC 739 PC.

19 Section 22 (2), Limitation Act, 1908 (section 21, Limitation Act 1963); *Raj Kishore* v. *Alam*, 90 IC 82, A 1926 Pat 28.

limitation arose and the plaint must be deemed on amendment to have been instituted in the name of the real plaintiff on the date on which it was originally instituted.[1]

When a defendant is made plaintiff or *vice versa*, no consequential question of limitation arise.[2] Where A sued making B a *pro forma* defendant, and the court finding B and not A entitled to a decree transferred B to the array of plaintiffs and gave him decree even after limitation, it was held that this was right.[3] In a similar case, however, the *pro forma* defendant was not allowed to be made a plaintiff on the ground that the defendant should not be deprived of the valuable right which accrued to him under the law of limitation.[4] If, however, he had been allowed to be made a plaintiff, the case could not be dismissed on the ground of limitation.[5]

Effect of New Section 21 : The Limitation Act, 1963 contains section 21 in place of section 22 of the old Act. Hence in view of the provisions of section 8, General Clauses Act, O.1, R.10 (5) should now be treated as subject to section 21 of the new Limitation Act. This section contains a proviso which softens the rigour of the old section 22. The proviso gives discretion to the court, if it is satisfied that the omission to include a new plaintiff or defendant was due to a mistake made in good faith, that the suit as regards that plaintiff or defendant shall be deemed to have been instituted on any earlier date. The old cases noted above must, therefore, be read subject to this qualification. Thus where by a *bona fide* mistake in a suit by an airconditioner repairer for his charges the true owner of the airconditioner was not originally impleaded but was permitted to be impleaded after the expiry of limitation for a fresh suit against him the proviso was applied and the suit held to be within time.[6] "Good faith" however implies due care and attention. The relevant facts should, therefore, be pleaded to show that the earlier omission was *bona fide*.[7]

1 *Jai Jai Ram Manohar Lal* v. *National Building Material Supply*, A 1969 SC 1267, (1969) 1 SCC 869.

2 *Ambi* v. *Kelan*, A 1937 Mad 843.

3 *Moolchand* v. *Bhup Singh*, 105 IC 473, 3 Luck 241.

4 *Ram Das* v. *Chhota*, 104 IC 526 Pat.

5 *Nanak Chand* v. *East Indian Railway*, A 1925 Lah 441 (DB), 6 Lah 193.

6 *Sizing Materials Chemicals Ltd.* v. *Asit Kumar*, A 1984 Guj 179; *Karuppasamy* v. *Ramamurthy*, A 1993 SC 2324.

7 *Lalit Kumar* v. *Jai Ram Das*, A 1984 P&H 426 (benefit not granted as mistake was not in good faith).

Form of Amendment : When permission has been obtained for substitution or removal or addition of a party, the plaint must be amended accordingly. It will not be sufficient to amend the cause title, but all consequential amendments in the body of the plaint should also be made. For example, if a new defendant has been added, a paragraph should be added showing his liability. If a defendant has been struck out, all references to him by name or number should be omitted and if the number of defendants in the cause title has been altered, the reference in the body should also be amended. If a defendant is dead and his heirs are substituted, allegations should be made about the death of the defendant, the fact that the newly added persons are his heirs, and facts showing how they are liable for the plaintiff's claims.[8]

Challenge to Amendment by Newly Added Party : Even after the court has allowed an amendment for addition of a new defendant after expiry of limitation accepting the plaintiff's plea that the earlier omission was *bona fide*, it is open to the newly added party to ask the court, after he appears to recall the order of amendment passed in his absence.[9]

Representative Suits : Suits in which parties represent others or themselves and also others, are called "representative suits." Such suits are allowed to be filed by one or more persons as a mere rule of convenience. They are really exceptions to the general rule that all persons interested in the subject-matter of the suit should be made parties to it, so that the dispute may be finally decided. The object is to avoid delay, harassment and unnecessary expenses to parties and to save public time.[10] The condition, however, is that the number of interested persons should be numerous and they should have a common interest. In order to make a suit representative it is further necessary to obtain the permission of the court at the earliest opportunity. Examples of such suits are the suits by or against the manager of a joint Hindu family as representing the whole family, suits in respect of a public trust under section 92, C.P.C. filed for vindication of public rights as distinguished from individual or personal

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8 *Kanailal* v. *Ram Nihash*, 55 CLJ 228.

9 *Leadhitter* v. *Lodge Finance Ltd.*, (1982) 2 All ER 167 (case law discussed).

10 *Chairman Tamil Nadu Housing Board* v. *T.N. Ganapathy*, A 1990 SC 642; *A. Ali Akbar* v. *Distt. Munsiff Pathikollai*, A 1993 Mad 51.

rights of plaintiffs,[11] suits by members of the public in respect of a public nuisance under section 91, C.P.C., suits under section 14 of the Religious Endowments Act; suits under O. 1, R. 8. Examples of the other kind of such suits are by executors, trustees, *mutawallis*, *benamidars*, or by creditors.

Suits under O.1, R.8 : This rule is redrafted and substituted for the old Rule by the Code of Civil Procedure (Amendment) Act, 1976. The rule provides that where there are innumerous persons having the same interest in one suit, one or more of such persons may, with the permission of the court, sue or be sued or may defend suit on behalf of or for the benefit of all the persons so interested. The rule is intended to avoid conflicting decisions and multiplicity of proceedings when there are innumerous persons having the same interest in a suit. This rule formulates an exception to the general principle that all persons interested in a suit shall be parties thereto. It is an enabling rule of convenience prescribing the condition upon which such persons, when not made parties to a suit, may still be bound by the proceedings therein.

Scope : There are no words in O.1, R.8 to limit its scope to any particular category of suits or to exclude a suit in regard to a claim for money or injunction.[12] If there are creditors more than one, a representative suit may be filed under O.1, R.8.[13] Under Rule 8A, the Court can allow third person or body of persons to present his or its opinion on the question of law and take part in the proceedings.

Numerous persons : The word "numerous" is not a term of art. It only means a group of persons so much as would make it inconvenient to implead all of them individually. 'Numerous' does not mean numberless or innumerable.[14] The question 'Numerous' is a matter of discretion for the Court.[15] There, in that case, members of an educational society not more than 30 were held to be numerous. The expression does not include the general public and a suit under O.1, R.8 on behalf of, general public is

11 *Sugra Bibi* v. *Haji Kummu*, A 1969 SC 884.
12 *Chairman, Tamil Nadu Housing Board* v. *Ganapathy*, A 1990 SC 642.
13 *Ramji Hirji* v. *Ramji Gopal*, A 1974 Guj 153.
14 *Kailash* v. *Goswami*, A 1950 All 409; *Vimal* v. *S*, 66 CWN 912.
15 *Narayanan* v. *Kurichi Thanam*, A 1959 Ker 379.

not maintainable.[16] The body of persons represented must be sufficiently definite.[17] A suit must be on behalf of a defined class though that class may be composed of more or less indefinite persons or even fluctuating, eg., Legatees under the will;[18] tax payers or residents of a locality,[19] disciples of a mutt,[20] devotees of a deity [1] worshippers in a mosque or beneficiaries of a wakf; [2] members of a sect; [3] members of a caste; [4] fellow villagers.[5]

Same interest : The persons on whose behalf the suit is brought must have the same interest. The existence of 'same interest' is the *sine qua non* for the application of O.1, R 8. The expression 'same interest' means a common interest or a common grievance.[6] There must be community of interest.[7] Where many tenants have a common grievance against the landlord regarding the denial of tenancy rights, a representative suit can be filed by one or more of the tenants.[8] Either the interest must be common or they must have a common grievance which they seek to be redressed. The Tamil Nadu Housing Board allotted houses to the members of low income group, tentative prices were fixed and received. After the lapse of more than a decade, fresh demand were made in 1975 threatening dispossession in case of non-payment which led to the filing of the suit under O.1,R.8. It was held that though each allottee is interested individually in fighting out his demand separately made to him, that did not make O.1, R.8 inapplicable.[9] It was further held that the word same should not be interpreted as "identical" and would cover similar though distinct interest.[10]

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16 *Adamson* v. *Arumugam*, 9 Mad 463.
17 *Harson* v. *Mazoor*, A 1948 PC 66.
18 *Geeribabu* v. *Chanderkant*, 11 Cal 213.
19 *Manmatho Natu* v. *Harish Chandra*, 33 Cal 905.
20 *Chidambaranatha* v. *Nallasiva*, 41 Mad 124.
1 *Veerabasavara* v. *Devotees of Lingadagudi Mutt*, A 1973 Mysore 280; *M.M.B.Catholics* v. *Panlo*, A 1959 SC 31.
2 *Ashraff Ali* v. *Md. Nurojomma*, 23 CWN 115; *Karima Beevi*, 27 MLJ 270.
3 *Srinivasa* v. *Raghava*, 23 Mad 28.
4 *Ganapathy* v. *Santhi*, 21 Mad 10.
5 *Kalan* v. *John*, 29 Cal 100.
6 *Manavednam* v. *Veerayan*, A 1939 Mad 751.
7 *Kodiya* v. Velandi, A 1955 Mad 28 (FB).
8 *Goshalmarg Residents Association* v. *DCM Ltd.*, A 1991 Del 334.
9 *Tamil Nadu Housing Board* v. *Ganapathi*, A 1990 SC 642.
10 *Batar Singh* v. *Bilaso*, ILR 46 Pat 977.

Cause of action : Under the old rule, there was a doubt whether a representative action could be brought when there were separate causes of action. The explanation introduced under the new rule has clarified the position. There is therefore no doubt that the persons who may be represented in a suit under O.1, R.8 need not have the same cause of action. [11]

Permission of the Court : The permission of the court to sue or to be sued in a representative capacity is a mandatory condition. The proper course is to obtain the permission before the suit.[12] The permission may be granted even after the suit;[13] and even by the Appellate court.[14] The courts should not grant permission as a matter of course. It must consider the array of parties and must be satisfied that the parties sought to be represented are not prejudiced.[15] In deciding the question of leave, the principal consideration that should weigh with the court is that whether there is sufficient community of interest as between the Plaintiffs or the defendants as the case may be, to justify the procedure laid down in O.1, R.8.[16] Permission need not be express,[17] and could be implied.[18] Permission can also be inferred where the plaintiff's prayer is that she should be allowed to sue in a representative character.[19] Even in the absence of a formal order granting permission, direction to issue public notice is sufficient to infer permission being granted.[20] In an application for permission, the nature of the common interest involved in the case of persons so interested and any special claim of the plaintiff to represent must be stated.

Notice of suit : The issue of notice of the institution of the suit is peremptory. Non compliance with this rule cannot be cured under

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11 *Tamil Nadu Housing Board.*, supra

12 *Oriental Bank* v. *Gobin*, 9 Cal 604; *Giribala* v. *Chander*, 11 Cal 213.

13 *Maharishi Dayanand Educational Society* v. *Satyendra*, 1999 AIHC 1448; *Ahamed* v. *Abdul*, 14 Cal 258; *Sennu* v. *Krishnan*, 25 Mad 399; *Hubli & Co.* v. *Saraswaterva*, A 1953 Mad 334; *Narayanan* v. *Kunchitanam*, 1959 Ker 379.

14 *Kamaraju* v. *Malliya*, A 1947 Mad 194; *Mukaremdas* v. *Chhagam*, A 1959 Bom 491.

15 *Narayanan* v. *Kunachiyam*, A 1972 Ker 269.

16 *Kodiya* v. *Velandi*, A 1985 Mad 28 (FB).

17 *Dhunpat* v. *Paresh* 21 Cal 180; *Ismail* v. *Niamat*, A 1927 Cal 608.

18 *Ramrup* v. *Makala*, 1981 Pat 315.

19 *Mukkaremdas* v. *Chhagam*, A 1959 Bom 491.

20 *Narayanan* v. *Kunachiyam*, A 1972 Ker 269.

section 99 C.P.C.[21] The importance of the issue of notice cannot be over-emphasized as decisions in such suits become *res judicata* even against persons who are not on record but who are bound by virtue of the proceedings under this rule. The notice must mention the names of the persons who have been permitted to represent them so that the persons interested may have an opportunity of knowing who have been selected to represent them.[1] Further notice must disclose the nature of the suit as well as the reliefs claimed in order to enable the persons interested to get themselves impleaded as parties to the suit either to support the case or to oppose it.[2] Where the notice is not given as required by this rule, the decree will be *inter partes* only.[3] The court shall issue notice of the institution of the suit after the leave is granted.[4] The view that notice must be issued before the leave is granted, [5] it is submitted, is not good law especially in the light of the sub-rule (2) as amended in 1976.

Miscellaneous matters : As pointed out by Their Lordships of the Judicial Committee, O.1, R.8 is only an enabling provision and it in no way debars a member of a community from maintaining a suit in his own right, although, the act complained of may also be injurious to the whole community.[6] If no permission is taken, under O.1, R.8 for a suit for declaration that the defendants or any member of a Sabha or Hindu community have no right to a certain property, a decree cannot be passed as in a representative suit but the decree can be given against the defendants.[7] But if the suit has been decided as a representative suit without sanction and without any objection by the defendants, it has been held that the frame of the suit cannot be allowed to be objected in the appeal.[8]

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21 *Munni* v. *Sarguth*, A 1973 All 281.

1 *Suka Dev* v. *Sri Sidheswar*, A 1986 Orissa 100.

2 *Harihar* v. *Bhagabat*, A 1987 Orissa 270.

3 *Kumaravelu* v. *Ramasamy*, A 1933 PC183.

4 *Munni* v. *Sigur*, A 1973 All 281.

5 *Amaravati* v. *Gobind*, A 1976 Bom 401.

6 *Kumaravelu* v. *Ramasamy*, A 1933 PC 183; *Jadu Singh* v. *Sandhya*, 101 IC 500; *Ramkli* v. *Munnalal*, A 1939 All 586.

7 *Gobardhan* v. *Shama*, 7 Pat 197.

8 *Dilawar* v. *Subham*, A 1931 Oudh 375.

O.1, R8A[9] enables the court to permit any person or body of persons to present his or its opinion and to take part in the proceedings of the suit under Order 1 Rule 8, if it is satisfied that it is necessary in the public interest to allow the third person or body of persons to present his or its opinion on the question of law and take part in the proceedings. This provision would enable organizations of citizens to take action in defence of right and lawful interest of others.

PARTIES IN SPECIAL SUITS

Suits relating to Hindu Religious and Charitable Endowments: Among Hindus there is no marked distinction between a religious and a charitable endowment. Whether the purpose of a grant is religious or charitable has to be decided in accordance with the Hindu notions.[10] By far the most important of the religious foundations in India are the temples and mutts, both supplementary in the Hindu ecclesiastical system and both conducing to spiritual welfare, the former by affording opportunities for prayer and worship, the latter by facilitating spiritual instruction and the acquisition of the religious knowledge, the presiding element being the deity or idol in the one, the learned and pious ascetic in the other.[11] The temples or the *devasthanams* have the richest and largest endowments in India which are being daily added to by devotees that flock to them in thousands all the year around. The temple is not a juristic person. The presiding element, that is, the deity or the idol is a juridical person possessing the juristic capacity of receiving gifts and holding the property. But it is only in an ideal sense that property can be said to belong to an idol and the possession and management of it must in the nature of things be entrusted to some person known as manager or *shebait* in the north and the *Dharmakarta* in the south.

As an idol is a juristic person capable of holding property, suits relating to property vested in it should be brought in the name of the idol, and not in that of the manager or *shebait*.[12] Of course, the idol must be

9 Inserted by Act 104 of 1976, Section 52 (w.e.f. 1-2-1977)

10 *Kesava Gounder* v. *Rajan*, A 1976 Mad 102.

11 *Vidyapurna* v. *Vidya Nidhi*, ILR 27 Mad 535.

12 *Jodhe Rai* v. *Basdeo*, 35 A 735; *Thakurani* v. *Shiva Sundari*, A 1945 Cal 376.

represented in the suit by some sentient being, e.g. the manager of its property. It is not necessary that such manager should be *de jure* manager. A *de facto* manager can also sue.[13] An idol is in the position of minor and when the person representing it leaves it in the lurch a person interested in the worship of the idol can be clothed with an *adhoc* power of representation to protect its interest.[14] In the case of a private temple, a person who has made large donations for the maintenance of the temple, can on behalf of the deity bring a suit for possession of the temple and the properties of the deity against the *pujari* or manager in order to protect the property from misuse and misappropriation.[15] But any intermeddler cannot sue as of right.[16] *Shebaits* do formally represent the deity and it is not necessary that it should be separately represented by a disinterested person unless the interest of the *shebait* is adverse to its interest.[17] Even a suit by some of the *shebait* is held to be maintiainable.[18] The title of the suit would be like this: "AB, an idol installed in the temple at Meerut, through CD, the manager of the temple". It has however, been held that it is immaterial whether the suit is brought by the idol represented by the *shebait* or by the *shebait* of the idol, *i.e.*, whether the title is "AB, a deity, through CD, its *shebait*" or "CD *shebait* of the deity AB."[19]

Where, however, the *shebait* declines to institute a suit and his interest is adverse to that of the idol, the idol should be added as a party

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13 *Gopal Datt* v. *Babu Ram*, 162 IC 346, A 1936 All 953; *Jawahar* v. *Radha Gopal*, A 1945 All 169.

14 *Bishwanath* v. *Radhaballabhji*, A 1967 SC 1044, (1967) 2 SCR 618; *Vikram Das* v. *Daulat Ram*, A 1956 SC 382.

15 *Ram Chand* v. *Thakur Janki Ballabhji Maharaj*, A 1970 SC 532; *Thenappa Chettier* v. *Karuppan*, A 1968 SC 915.

16 *Doongar* v. *Mukhu*, A 1947 ALJ 14; *Vikram Das*, supra.

17 *Shridhar* v. *Monudra*, A 1940 Cal 285; *Manmohan* v. *Debbendra Prasad*, A 1949 Cal 1997; *Vikram Das* v. *Daulat Ram*, A 1956 SC 382.

18 *Guru Charan Jena* v. *Satya Narayan Jena*, A 1971 Ori 15; *Idol Shivji Lakherapura* v. *Gappulal*, 1977 MPLJ 804; *Murthi Pujakar Samastha* v. *Waman Dattaraya*, A 1979 Karn 111.

19 *Gobinda* v. *Mahant*, 62 CLJ 153; *Deoki* v. *Raghvindra Singh*, 183 IC 371, A 1939 Pat 430; see also, *Maharaja Jagadindranath* v. *Rani Hemanta Kumari*, 32 C 129, 3 CWN 809 PC; *Gorachand* v. *Makhan Lal*, 11 CWN 489; *Jogannath* v. *Hari Mohan*, 59 IC 469 Cal.

represented by a disinterested next friend or guardian *ad litem*.[20] Ordinarily in such cases and in cases where the idol is added as defendant, a person interested in the worship or in the subject-matter of the suit, having no interest adverse to that of the idol, is appointed as a guardian *ad litem* of the idol.[1] A person appointed as *sarbarakar* of a trust property is entitled to bring a suit in his own name for the benefit of the idol.[2] This is only an alternative form which is also permissible (see the form given in item No. 1 of Appendix A to C.P.C.). A *shebait* or trustee is competent to defend a suit against an idol, and a decree obtained against him will be binding on the deity, even though the *shebait* had himself made the transfer which is sought to be challenged by the suit.

If a property is conveyed to a person in trust for a temple or idol, it vests in that person, the idol being only the beneficiary, and he is entitled to sue and liable to be sued in respect of such property. The idol is a necessary or at any rate a proper party in a suit under section 5 (3) of the Charitable and Religious Trusts Act.[3] A suit for possession of endowed property on behalf of the idol, endowment or trust without resorting to the proceedings under Section 92 CPC is maintainable.[4]

A suit instituted in representative capacity under O.1, R.8 on behalf of the entire worshippers of the temple is maintainable.[5] In a suit for administration of temple, idol is not a necessary party.[6]

Suits by or against *Mutt (Math)*: Next to the temples a considerable portion of endowed property is held by *Mutts* presided either by ascetics or *sanyasis* called *Mahant* in the north or *Madathipathi* in the south. A *mutt* is an institutional sanctum presided either by a superior who combines in himself the dual office of being the religious or spiritual

20 *Kalimata* v. *Nagendra*, 44 CLJ 522; *Sharat* v. *Dwarka Nath*, 58 Cal 619; *Maruti* v. *Shrigopal*, 54 BLR 415, 418.

1 *Kalimata* v. *Nagendra*, 44 CLJ 522; *Sheoramji* v. *Sri Ridhnath*, 45 All 319; *Pashupati Nath* v. *Pradyumna Kumar*, 63 Cal 454.

2 *Radha Krishna* v. *Maharaj Kunwar*, 164 IC 919, 1936 OWN 728.

3 *Narayan Bhagwantrao* v. *Gopal*, A 1960 SC 100.

4 *Ram Lal Kanwal* v. *S.S. Jain Sabha, Faridkot*, A 1988 NOC 18, (1987) Punj LR 621 (DB).

5 *Palickal Mannady Bhagwathy (Deity)* v. *Velayudhan Pillai Govinda Pilaai*, 1986 (I) CCC 342 (Ker) (DB).

6 *Sukuaran* v. *Akamala Sree Dharma Idol*, A 1992 Ker 406.

head of the particular cult or religious fraternity and of the manager of the secular properties of the institution.[7] These institutions whose object is the imparting of spiritual instruction and the maintenance and strengthening of the doctrines and tenets of particular schools of Philosophy have become the centres of classical and religious learning exercising considerable influence over the laymen in the neighbourhood.[8] Like an idol, the *mutt* is also a juridical person.[9]

The property of the *mutt* vests in its *mahant* and suits in respect of it must be brought in the name of the *mahant*.[10] A decree against the *mahant* is binding on his successors as they form a continuing representation of the property of the *mutt*.[11]

Suits by or against Muslim *Waqfs*: A muslim *Waqf* is not juristic person and cannot sue or be sued in its name. The property which is subject to *waqf* vests in God Almighty, the *mutawalli* of the *waqf* can file a suit for recovery of *waqf* property.[12] Under Muslim Law, *waqf* can be created by dedication and in certain cases by user.[13] Where a *mutawalli* has himself alienated the property illegally, or he neglects to protect the property from trespassers, even worshippers[14] and other Muslims can maintain a representative suit. Under various *waqf Acts*—— Central and State Acts, whichever be applicable——the statutory *waqf* Boards have also been given power to take action on their own to recover *waqf* properties from trespassers or transferees under illegal alienations from *mutawallis*.

Suits by or against Government: Under Article 300 of the Constitution of India, and section 79, C.P.C., the Central Government may sue or be sued by the name of the Union of India and the State

7 *Krishna Singh* v. *Mathura Ahir*, A 1980 SC 707.

8 *Vidyapurna* v. *Vidya Nidhi*, ILR 27 Mad 535.

9 *Pushpagiri Mutt* v. *Ramalinga Sastry*, 1979 (I) MLJ 54.

10 *Ram Prakash* v. *Anand*, 43 IA 73; *Narsembaswami* v. *Venkatalangan*, 50 Mad 687; *Thakurdwara* v. *Isher Das*, 9 Lah 588; see also, *Vidya* v. *Baluswami*, A 1922 PC 123.

11 *Gulabbhai* v. *Sahnag Das*, 52 Bom 431.

12 See in this connection, *Abdur Rahim* v. *Narayan Das*, A 1923 PC 44; *Saadat Kamil* v. *Attorney General*, A 1939 PC 185.

13 *Syed Edullah* v. *Madras State Wakf Board*, A 1966 Mad 439.

14 *Amir Jan* v. *Shaik Sulaiman*, (1968) 2 MLJ 559.

Government may sue or be sued in the name of the State. Where however, a suit was brought against "Government of Rajasthan" instead of "State of Rajasthan", and appeal was filled against, "State of Rajasthan", it was held that although the suit was brought wrongly against "Government of Rajasthan" the misdescription was not fatal. Such a misdescription can be corrected at any time.[15] Suits between State Governments or between a State Government and the Central Government arising out of their respective rights and obligations under the Constitution, as distinguished from ordinary disputes arising out of commercial like transactions can only be filed in the Supreme Court under Art. 131 of the Constitution. Suits relating to ordinary disputes may be filed in the ordinary courts.[16]

In suits against Railways, administered by the Government, summons or notice of suits has to be served on the General Manager of the concerned Railways.[17] Such a suit against the Railway administration must be instituted against the Union of India.[18] The filing of an application for ejectment against President of India in respect of occupation of premises by military estate officer was held wrong and illegal.[19]

Suits by or against Partnership and H.U.F Firms: Any two or more partners carrying on business may, by virtue of O.30, R.1, sue or be sued in the name of their firm.[20] This is only an enabling rule and does not prevent parties suing or being sued in their individual names as a firm is not an independent or separate person but only a compendious name for denoting the partners.[1] The rule does not apply to foreign firms[2] and the suit must be brought by, or against, all the partners. Even after dissolution of the firm, the suit can be brought in the name of the firm provided the firm existed at the time of the accrual of the cause of action,[3] though not

15 *Pusha Ram* v. *Modern Construction Co. (P) Ltd.*, A 1981 Raj 47.
16 *State* v. *South Central Railway*, A 1977 Karn 168.
17 *Union* v. *Andre Razack*, A 1956 Pat 511.
18 *S.* v. *General Manager*, A 1976 SC 2538.
19 *Union of India* v. *S.H.Surinder Chand Mehra*, A 1985 P & H 68, 70.
20 *Gambhirmal* v. *J.K.Jute Mills*, A 1963 SC 243.
1 *Atma Ram* v. *Mian Vma Ali*, A 1940 Lah 256, 190 IC 78.
2 *Joharmal* v. *Lakshmandas*, 36 BLR 1983, A 1934 Bom 467; *Purushottam* v. *Manilal & Sons*, A 1961 SC 325 (firm carrying on business outside India).
3 O.30, R.1; *American Furnishing* v. *Udai Ram*, A 1968 Delhi 163; *Afsar Husain* v. *Trilok Chand*, (1974) 2 CWR 1045;*Ganesh Trading Co.*v. *Moji Ram*, (1978) 2 SCC 91.

necessarily at the time of the suit.[4] Even a suit for dissolution of partnership existing between the plaintiff on the one hand and a different partnership or firm on the other, may be instituted against such firm without disclosing the names of individual partners of the defendant firm in the plaint.[5] In proceedings to which the provisions of O.30. are not applicable, all partners should be impleaded. But the suit against a firm to which partners are not made parties should not be dismissed on the ground of misdescription alone and the plaintiff may be allowed to correct the title.[6]

A suit *by* a joint Hindu family firm cannot be brought in the name of the firm under which the business is carried on; but must be brought by all the members or the managing member of the family in his capacity as such manager.[7] A suit *against* a joint Hindu family firm does, however lie to such suit O.30, R.1, applies.[8]

It is not necessary that all the partners should join in the suit, but any partner can sue in the firm's name, even though others refuse to join, and in that case it is not necessary to implead the latter. If the latter wants an indemnity against costs, the court can stay the suit till the indemnity is furnished by the suing partner.[9] It is not even necessary to disclose the names of partners of the plaintiff firm unless the defendant demands it, in which case the names have to be disclosed.[10] The title in such suits should be as follows : "AB a firm carrying on business in partnership at Calcutta".

It is not necessary to add, "through or by CD, a partner or manager". If the firm is the defendant, it is not for the plaintiff to say through whom

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4 *Firm of Baldeo Pd.* v. *Firm of Haji Ali*, 27 ALJ 73, 112 IC 715.

5 *Chotharam* v. *Khemchand*, 113 IC 370, A 1929 Sindh 7.

6 *Chhotaylal Pyarelal* v. *Shikharchand*, A 1984 SC 1570 (case under a State rent control law where the provisions of C.P.C. were not applicable).

7 *Amolak Chand* v. *Babulal*, A 1933 Bom 304, 35 BLR 569; *Lalchand* v. *M.C. Boid & Co.*, 61 C 975, 155 IC 991, A 1934 Cal 810, 38 CWN 914; *Hardeo Ram* v. *Girdhar*, 153 IC 510, A 1935 All 280; *Misri Lal* v. *Chandan Mal*, 1937 ALJ 41; *Motilal* v. *Girdhari Lal*, A 1942 Cal 613; contra, *Detaram* v. *Vishimdas*, 105 IC 854 Sind; see also, *Jai Jai Ram Manohar Lal* v. *National Building Material Supply Co.*, (1969) 1 SCC 869, A 1969 SC 1267.

8 *Alekh Chandra* v. *Krishna Chandra*, A 1941 Pat 596; *Jamunadhar* v. *Jumna Rai*, A 1944 Cal 138; *Hari Shankar* v. *General Merchants*, A 1956 Ori 186.

9 *Bhardeshwar Coal Co.* v. *Satish Chandra & Co* , 165 IC 390, A 1936 Cal 353.

10 O.30, R.2.

the firm shall defend the case.[11] Under the law any partner can put in a defence on behalf of the firm.[12] If the firm is the plaintiff, the plaint will certainly be required to be signed and verified by one of the partners, and the name of that partner will be disclosed in the signature, with the addition "a partner of the firm", but there is no necessity of disclosing it in the cause-title. The opening words "any two or more persons" in Rule 1, do not imply that at least two persons should be named in the plaint as partners of the firm. If any partner is also sued in his individual capacity, he should be added as a separate defendant in his own name.

If any partner dies before the institution of the suit, the suit can still be brought in the name of the firm and it is not necessary to implead his legal representative.[13] But in that case, the private estate of the deceased partner, as opposed to partnership assets, cannot be made liable even by a subsequent proceeding in execution under O.21, R.50 (2).[14] Therefore, if it is proposed to make such estate also liable, the plaintiff should implead the legal representatives as defendants. If a partner dies during pendency of a suit brought in the name of or against a firm, the suit does not abate if legal representatives are not substituted.[15] Even if all the partners die during the pendency of suit brought in the name of firm, the suit does not abate and legal representatives of all the deceased partners can be impleaded as plaintiffs.[16] A plaint can be amended under section 153 to substitute the names of the partners in a suit filed in the name of the firm.[17] The filing of a suit by the sole proprietor of the firm in the trade name is not fatal, as it amounts to filing of a suit in the name of a wrong person, such mistake can be rectified by amendment at any stage of the proceeding.[18] The assignees of the partners of a firm have right to be arrayed as parties to the suit.[19]

11 *Ajit Sing* v. *Grunning & Co.*, A 1925 Bom 494 (DB); *Phusia* v. *Mohd. Tassadduq Hussain*, A 1952 All 685.

12 O.30, R.1.

13 O.30, R.4; *Afsar Husain* v. *Trilok Chand Premchand*, (1974) 2 CWR 1045.

14 *Mathuradas* v. *Ebrahim*, 105 IC 305, 29 BLR 1296, 51 B 986.

15 *Prayag Mandar* v. *Mukteshwar*, A 1949 Pat 63; *Godavari Pravara Canal Co-operative Purchase & Sale Union* v. *Krishna Rao*, A 1974 Bom 52; *Upper India Cable Co.* v. *Bal Kishan*, (1984) 3 SCC 462.

16 *Jagatjit Industrial Corp.* v. *Union of India*, A 1981 Delhi 34.

17 *Purshottam* v. *Manilal & Sons*, A 1961 SC 325.

18 *Oriental Coal Co. Ltd.* v. *Mohanlal Kisan Lal*, A 1984 Bom 174 (DB).

19 *Jagat Ram* v. *Bodh Raj*, 1988 Srinagar Law Journal 173 (J&K).

If a partnership firm is not registered with the Registrar of Firms, care should be taken to get it so registered before instituting the suit so that the suit may not fail due to the bar of section 69, Partnership Act. Registration subsequent to the suit cannot cure the defect.[1] If the plaint states that the firm is registered and the defendant has not taken any objection under section 69 or questioned the authority of the person suing "as partner" the court cannot dismiss the suit as barred by section 69 on the ground that the plaintiff has failed to prove the registration. If it has any doubt on this score it should give opportunity to the plaintiff to give evidence in that regard.[2] If a suit is dismissed as barred by section 69, a fresh suit after registration of the firm on the same cause of action will not be barred by *res judicata*.[3]

If a firm is made a defendant, the plaintiff will have to obtain the direction of the court as to how the summons should be served, for under O.30, R.2, the summons can be served on any partner or manager "*as the court may direct*". The plaintiff should therefore make an application with the plaint proposing on whom he wishes to have the summons served and praying for the orders of the court. It is not sufficient merely to mention in the cause-title the name of the person on whom summons should be served as this is not a matter for plaintiff's choice; but if service has been effected on a person as a partner, it would not be bad on the ground that the direction of the court had not first been obtained.[4] Summons cannot be served on the legal representative of a deceased partner.[5] If the firm has been dissolved, the summons should be served on all partners within India whom it is sought to make personally liable,[6] and a partner not served will not be made liable by any subsequent proceeding in execution.[7] If it is not sought to make any partner personally liable and the plaintiff will be satisfied with a decree against the firm property, he need not serve the

1 *K.K.A. Ponnuchami Gounder* v. *Muthuswami*, A 1942 Mad 242; *Jammu Cold Storage* v. *Khairati Lal*, A 1960 J & K 101.

2 *Bhanu Enterprises* v. *Bhanu Beer Centre*, (1984) 2 An WR 122; see also, *Loonkaran* v. *John*, (1977) 1 SCC 379.

3 *Sri Baba Commercial Syndicate* v. *Channamaseti*, A 1968 AP 378.

4 *Keen* v. *Lily Biscuit Co.*, 138 IC 637, A 1932 Cal 541, 59 C 496.

5 *Mathuradas* v. *Ebrahim*, 105 IC 305, 29 BLR 1296, 51 B 986.

6 O.30, R.3.

7 *Madalsa Devi* v. *M. Ramnarain*, A 1965 SC 1718; *Topanmal* v. *Kundomal*, A 1960 SC 388.

partners personally.[8] If summons is intended to be served on a manager, a notice should also be served along with it informing the manager in what capacity the summons is served upon him, otherwise the service upon him will not be an effective service on the firm.[9]

The defence on behalf of the firm may be made by any partner, but the partner must appear individually in his own name,[10] though the defence will be on behalf of the firm. Each of the partners who has entered appearance as such has precisely the same right as regards the conduct of the case as one of the several defendants having a common defence.[11] The written statement should be headed as "Written Statement on behalf of firm AB, by CD, one of the partners appearing in the suit". The defendant firm will be sufficiently represented even if one of the partners appears. If several partners file separate defences, they will be all on behalf of the firm and will be regarded as so many different defences of one defendant. A manager cannot file a defence on behalf of the firm unless he comes within the definition of a "recognised agent" given in O.3, R.2, *i.e.*, unless (1) the partners live outside the jurisdiction of the court, and (2) they have not appointed any agent for defending their suits.

If a person is served as a partner, he may appear under protest denying that he is a partner, but in that case he cannot file a defence to the claim on merits.[12] In such cases, the plaintiff may disregard his appearance and service another partner or the manager and, if no appearance is made, may obtain *ex parte* decree against the firm,[13] without having the question of the partnership of the person appearing under protest determined. If the plaintiff afterwards wants to execute the decree against such person, he can do so only under O.21, R. 50(2).[14] If, however, the person

8 *Topanmal* v. *Assudomal*, 165 IC 907, A 1936 Sind 206; *Ibrahimjee* v. *British India Steam Navigation Co.*, 161 IC 324, A 1936 Sind 34.

9 O.30, R.5.

10 O.30, R.6.

11 *Purshottamlal* v. *W.T. Henley*, 1933 ALJ 1264, 145 IC 812, A 1933 All 523.

12 *Gambhir Mal Pandiya* v. *J.K. Jute Mills*, A 1963 SC 243; *International Co.* v. *Mehta & Co.*, 105 IC 356, 31 CWN 103, A 1927 Cal 780; *Nandlal* v. *Baker*, A 1940 Bom 390.

13 O.30, R.8.

14 *P.S. Ramaujachary* v. *Pohoo Mal*, '05, 28 BLR 1275, 50 B 665, A 1926 Bom 585 (DB).

appearing under protest insists, the court is bound to decide the question of his partnership.[15] In any case it is not possible for a person, who has been served with a summons to enter appearance and defend the suit on merits unless he admits that he is a partner, but when such person is interested in some way or the other in the assets of the firm, he can apply to be made a party and it will be proper for the court to implead him even against the wishes of the plaintiffs.[16]

If a single individual carries on business in a name other than his own, he cannot sue in that name and must sue in his individual name,[17] but under O.30, R.10, he may be sued in the name under which he carries on business. If an individual is carrying on business in some name other than his own, even if it be called a "Company" or a "Firm", etc., will be covered by this rule.[18] For instance, if A has a shop called the "Provincial Cycle Company" he can be sued in the name of the "Provincial Cycle Company", but if he himself has to bring a suit, he must do so in his personal name. But this rule applies only if business is carried on at the time of suit, and in India.[19] If the proprietor is dead, the suit should be brought against his legal representatives and not against the trade name.[20] When a suit is brought against a person in his trade name, his legal representatives should be brought on record if he dies during the pendency of the suit.[21] All the rules relating to service on a firm apply when the defendant is sued in such assumed names.

Other Suits by or against Joint Hindu Family : Members of a joint Hindu family may sue or be sued in their individual names, but the manager or *karta* may represent the family in all transactions relating to the joint family property or entered into by him as such manager.[1] A decision

15 *Vithaldas* v. *Hansraj*, 23 BLR 1249; *Gambhir Mal Pandiya* v. *J.K. Jute Mills*, A 1963 SC 243; see also, *Gajendra Narain Singh* v. *Johrimal Prahlad Rai*, A 1964 SC 581.

16 *Dhai* v. *Har Govindroy*, 40 CWN 677.

17 *Scott* v. *Jitta & Co.*, 38 BLR 529; *General Auto Agencies* v. *Hazari Singh*, A 1976 Raj 56.

18 *Rajendra Pd. Oil Mills* v. *Chunni Devi*, A 1969 All (FB); *M.K.M. Morsa Bhai Amin* v. *Rajasthan Textile Mills*, A 1974 Raj 194.

19 *Joharmal* v. *Lakshmandas*, 36 BLR 983, 34 B 467.

20 *Habib Bux* v. *Samuel Fitz & Co.*, 23 ALJ 861, 89 IC 22, A 1926 All 161; *Daulat Ram* v. *Ishar Das*, 111 IC 706, A 1929 Lah 149.

21 *Hari Bandhu* v. *Hari Mohan*, 34 CWN 36.

1 *Kallian Rai* v. *Kashinath*, A 1943 All 188.

in a suit by a managing member to establish a right in immovable property is, therefore, binding on the other members, and a decree obtained against him as manager for debts contracted by him or a deceased manager for family purposes will be binding on the whole co-parcenary property,[2] but a decree obtained against him personally can be executed against his share only. It is not necessary that a manager sued in his representative capacity should be so described in the plaint.[3] But there is no presumption that whenever the manager is sued the members must be deemed to have been represented.[4] The question always is whether in fact he did respresent the family in the proceedings or not. Where he had contracted debts for family purposes and was sued in respect of those debts, the presumption is that he was sued in his representative capacity.[5]

Where one R was one of the plaintiffs and other members of his family were defendants and one of the latter, on his application was transposed as a plaintiff and was represented by another pleader, it was held that R could not be said to have sued as manager of the family but all members were parties in their individual capacity.[6] In a suit on a mortgage of joint family property, all the members may be impleaded as defendants, but the manager may ordinarily represent the junior members.[7] The other members may be joined as proper but are not necessary parties.[8] In such cases it is always better to say in the plaint that a particular person sues or is sued as manager of a family, but even if there is no express allegation and the circumstances show that the defendant was manager and that the property was a joint family property, the natural inference will be that he is sued in his capacity as manager.[9]

If, however, every member of a family is impleaded including the manager without the latter being described as such, and one member is

2 *Lingangowda* v. *Basangowda*, 51 B 450 PC.

3 *Devidas* v. *Shailappa*, A 1961 SC 1277.

4 *Rangaswami* v. *Kandaswami*, A 1942 Mad 732.

5 *Mulgund Co-operative Society* v. *Shidhugappa*, A 1941 Bom 385.

6 *Labhu Ram* v. *Ram Pratap*, A 1944 Lah 76.

7 *Harilal* v. *Munman*, 34 A 549, 15 IC 126; 9 ALJ 819; *Raja Ram* v. *Gopinath*, 133 IC 416, A 1931 All 721.

8 *Devidas* v. *Shailappa*, A 1961 SC 1277 (para 12).

9 *Sheo Shankar* v. *Jaddo Kuar*, 36 A 383, 21 IC 504 PC; *Prithipal* v. *Rameshwar*, 99 IC 154, 3 OWN 954; *Rameshwar* v. *Bishambhar*, 111 IC 174 Oudh; *Sethuratnam*

either left out,[10] or though impleaded, is a minor for whom no guardian *ad litem* has been appointed,[11] the manager cannot normally be presumed to represent him. If the manager is the mortgagor himself, a suit can be brought against him alone, and as he cannot plead that he was not authorised to make the mortgage, and a decree can also be passed against him, but the other members can have it set aside on grounds ordinarily open to such members under the law.[12] If any of the junior member wishes to be joined in the mortgage suit, the court should implead him as a proper party.[13]

The widow of a deceased co-parcener succeeding with her son under Hindu Women's Right to Property Act, 1937, is not an heir but continues to be member of a joint family and the son is entitled to represent her also in a suit on a pronote belonging to the joint family and to bring a suit without impleading her.[14] In a suit for partition of joint family property, every person entitled to share is a necessary party. So in a suit by the widow of a pre-deceased son against her father-in-law, her mother-in-law is also a necessary party.[15]

Suits by or against a Corporation : Corporations are of two kinds :-

(1) "Corporation Sole" is an incorporated series of successive persons.[16] It is a body corporate having perpetual succession, constituted at a time, in a single person, e.g., the Administrator General and the Official Trustees who is under law constituted as corporation sole under section 5 of the Administrators General Act 1963 and section 6 of the Official Trustees Act 1913 respectively.

A suit by or against a corporation sole must be brought in its corporate name, e.g., "The Administrator General and Official Trustee for the State of Uttar Pradesh."

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v *Chinna*, A 1930 Mad 206; *Ram Kishen* v. *Ganga Ram*, 133 IC 1161; *Mukhram* v. *Kesho Pd.*, 162 IC 879, A 1936 Pat 258; *Bhagwandas* v. *Radha Kishan*, 164 IC 69, A 1946 Sind 87; *Trimbak* v. *Sonkaran*, A 1948 Nag 324.

10 *Ganganand* v. *Rameshwar Singh*, 102 IC 449 Pat; see however, *Deo Narain* v. *Phagu*, 121 IC 817, A 1930 All 541.

11 *Chandi Prasad* v. *Balaji*, 129 IC 560, 1931 ALJ 152, A 1931 All 136.

12 *Nathu* v. *Ram Sarup*, 23 ALJ 246, A 1925 All 335 (DB).

13 *Moti Ram* v. *Lal Chand*, 170 IC 192, A 1937 Nag 121.

14 *Markipudi* v. *Madanamchedu*, A 1943 Mad 708.

15 *Bhanwar Singh Bhandari* v. *Pilabai*, A 1972 MP 204.

16 Salmond's Jurisprudence, 12th Edition, p. 308.

(2) "Corporation Aggregate" is an incorporated group of co-existing persons.[17] It is a collection of many individuals united into one body under a special denomination having perpetual succession under an artificial form and vested by the policy of the law into the capacity of acting in several respects as an individual. Joint Stock Companies, Municipal Boards, District Boards, Co-operative Societies, Universities, State Electricity Boards, State Road Transport Corporations, State Financial Corporations, and Nationalised Banks, are examples of such corporations.

Suits by or against a registered company or by other corporation aggregate should be brought in the official style and name of the corporation,[18] and not in the name of any of its officers, or of an agent, unless a corporation is, by the statute incorporating it, permitted to sue, or is required to be sued in some other name, in which case it should sue or be sued in that name. When suing on behalf of a corporate body or bringing a suit against it, the relevant Act under which it is incorporated and the provisions of incorporation should be carefully looked into. The name of the officer signing or verifying a plaint need not be mentioned in the heading.[19] For instance, the title of a suit against a registered company[20] should be like this: "AB Company Limited, having its registered office at 9/20, Civil Lines, Kanpur". A suit on behalf of a company in liquidation should be brought in the name and on behalf of company and not in the name of the liquidator.[1] A decree against an officer, e.g., the agent, would not bind the company, but if the plaint shows that the description of the defendant is a mere error and that the real person sued was the company, the suit may proceed against the company.[2] A suit against a Municipal Board should be brought against the Board and not against the Secretary or the Chairman. The title would be "The Municipal Board of—." In all

17 Ibid.

18 *Ramdas* v. *Stephenson*, 10 WR 366; *Singer Manufacturing Co.* v. *Baijnath*, 30 C 105.

19 *Naram Das* v. *Quershi*, A 1933 Sindh 102, 142 IC 361.

20 *Campbell* v. *Jackson*, 12 C 142.

1 *Liquidator of Globe United Engineering & Foundry Co. Ltd.* v. *Hindustan Brown Boveri Ltd.*, A 1974 Del 200.

2 *Radhelal* v. *E.I. Ry.*, A 1926 Pat 40, 90 IC 680, 5 Pat 128.

such cases, the name of the officer, upon whom service of summons should be made, should be mentioned after the name of the company or corporation, by the addition of such words as "through the Secretary" or "through the Managing Director". Even though this is not a legal requirement, the court should get this information *i.e.*, mode in which, and the person on whom, the plaintiff desires the summons to be served.[3]

Suits by or against Societies : Societies registered under the Societies Registration Act, 1860 are not corporations aggregate[4] and cannot therefore, sue or be sued in their names but may sue or be sued in the name of the President, Chairman, Principal Secretaries or Trustees as may be determined by the rules of society (see section 6). The title of the suit should be somewhat as follows:

"AB, President of the Arya Sabha U.P., a society registered under the Societies Registration Act, 1860".[5] Where the rules of a Society empower its Secretary to institute and defend the proceedings on behalf of the Society, suit instituted by the Secretary of the Society is properly instituted suit.[6] A person having a claim against the society may sue any of the above persons, unless on an application to the governing body referred to in section 16 some other officer or person is nominated to be the defendant (section 6, proviso). The society can sue its individual members for any arrears or dues or penalty, or for any damage in respect of any unlawful detention of, or injury, or destruction to, any property of the society (section 9, 10).

Suits by or against Co-operative Societies : Such societies like joint stock companies, owe their existence to agreement among members and are registered under the provisions of an enactment. They are registered with the Registrar of Co-operative Societies of the State. Unlike societies registered under the Societies Registration Act, the Co-operative Societies can sue and be sued in their own names. Under the rules and bye-laws, generally the Secretary is authorised to represent them. In a suit by a Bank for recovery of loan from a registered Co-operative Society, the

3 *Narain Das* v. *Qureshi*, A 1933 Sindh 102, 142 IC 361.
4 *Board of Trustees* v. *State of Delhi*, A 1962 SC 458.
5 *Moti Ram* v. *Mangharam*, A 1942 Sindh 130.
6 *Parul Das Roy* v. *Anath Das*, A 1991 Cal 1.

administrator or any officer of the society is neither a necessary nor a proper party as he acted for and on behalf of the society in taking loan and not on his own behalf.[7] However, the disputes touching the business of such societies, whether between two societies or the society and its officers or servants and agents or between any two or more members, are decided through arbitration machinery provided in the statute relating to registration of such societies.

Suits by or against Unregistered Associations : Suits by, or against, an unregistered company, society or other association such as an unregistered club or a library, cannot be brought in the name of the company, society or association but must be brought by or against, all the members of such institutions. If the number of such members is large, advantage may be taken of the special procedure of O.1, R.8,[8] but that is only if there is a cause of action against all the members, e.g., when they entered into the contract or they authorised it.[9] Often in case of unregistered clubs, members at the time of a suit are different from those at the time of accrual of cause of action, as the composition of such bodies is fluctuating. In such a case, present members cannot be liable for debts incurred before they became members; and therefore the procedure under O.1, R.8, cannot be availed of.[10] It has been held that this procedure is inapplicable to a money suit but can be applied in a suit for declaration or injunction.[11] The plaintiff may however, claim a declaration that he is entitled to the sum due to him which should be paid out of the funds of the society.[12]

Suits by or against Trustees : In all suits concerning property vested in a trustee, executor, or administrator, where the contention is between the person beneficially interested and third persons, the trustee,

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7 *Punjab National Bank Ltd.* v. *Panchsheel Industrial Cooperative Society Ltd.*, ILR 1979 (1) Del 300.

8 *Radhaswami Satsang Sabha* v. *Putta*, A 1984 All 198; *Muhammadan Association* v. *Bakshi*, 6 A 284; *Corporation of Trivandrum* v. *Narain Pallai*, 1968 Ker T 285, 1968 Ker LR 180.

9 *Scott* v. *The Firm*, 88 IC 784 Sindh.

10 *Barker* v. *Allamassar*, (1937) 1 All ER 75, 78, 79.

11 *Ratnaswami* v. *Prince of Arcots Endowment*, ILR 1938 Mad 1094.

12 *Harish Chandra* v. *A.S. Graig*, A 1942 Bom 136; *Ideal Films* v. *Richard*, (1927) 1 KB 374.

executor or administrator shall represent the persons beneficially interested[13] and shall be described as follows :

"AB, a trustee of the estate of CD, deceased", or "AB, executor of CD, deceased".

If there are more trustees, executors or administrators, than one, all shall be joined as parties, except those who are outside India.[14] If any one refuses to join or has an adverse interest, he should be impleaded as defendant.[15] If any trustee is not joined, the suit will fail, and O.1, R.9, will not save it.[16] It can, however, be saved by impleading the remaining trustees by leave of the court.[17] An executor who has not proved his testator's will, need not be joined. The court may, in a proper case, add the beneficiary as a party, e.g., when the trustee, executor or administrator's interest is hostile to the beneficiary or he appears to be in collusion with the debtor of the estate.

Suits by or against Foreign States, Ambassadors and Envoys: "Foreign State" and "Ruler" of foreign State are defined in section 87A, C.P.C. Section 84 permits a foreign State to sue to enforce a private right vested in the Ruler of such State or in any officer of such State in his public capacity.[18] Section 85 provides for appointment of authorised persons to act on behalf of such Rulers. Section 86 places certain restrictions on suits against Rulers, Ambassadors, Envoys and High Commissioners and other specified members of embassy or High Commission staff of such foreign States. Normally consent should be sought from the Central Government through the Secretary to Government of India, Ministry of External Affairs, New Delhi, before instituting such suit except where the case is covered by the proviso to section 86(1) or by any general order of the Central Government under section 86(2). When such suit is maintainable the suit may be filed by or against the Ruler in the name of his state or when such state is defendant,

13 O.31, R.1.

14 O.31, R.2.

15 *Mohammad Soleman* v. *Tasadduq Hussain*, A 1935 Cal 623; *Nazir Ahmad* v. *Raghbat Ali*, 53 IC 478 Cal.

16 *Ram Ghulam* v. *Shyam Sarup*, 1933 ALJ 1393, 55 A 687.

17 *Capt. Daniels* v. *G.D.F. Trust*, A 1959 All 579.

18 *Mirza Ali Akbar* v. *U.A.R.*, A 1966 SC 230.

in the name of an agent, or in any other names as may be specified in the consent granted by the Central Government. While considering whether to give consent or not the Central Government is not expected to decide whether the claim is well founded or not but may refuse consent for frivolous suits so that the foreign States may not be unnecessarily harassed.[19]

Suits by Other Aliens : Alien enemies residing in India with the permission of the Central Government, and alien friends, may sue in any court otherwise competent to try the suit, as if they were citizens of India, but alien enemies residing in India without such permission, or residing in a foreign country, shall not sue in any such court.[1]

Every national of a foreign country, the government of which is at war with India, is deemed to be an alien enemy. Besides, every other person residing in such country and carrying on business in that country without a licence in that behalf granted by the Central Government, shall, for the purpose of section 83, be deemed to be an alien enemy residing in a foreign country. A foreign national who is not alien enemy is deemed to be an alien friend.

Suits against Rulers of Former Indian States : Section 87 B, provides that the provisions of section 85 and sub-sections (2) & (3) of section 86 (referred to above) apply *mutatis mutandis* to suits by or against rulers of former Indian State but only in respect of a suit based wholly or in part upon a cause of action which arose before 26th January 1950 or of a proceeding arising out to such suit.[2] This restriction is thus of not much practical importance now.

Suits by or against Insolvents and Receivers of their Property: On the making of an adjudication order, the entire property of an insolvent vests, in the Presidency towns, in the Official Assignee,[3] and in other towns in the court or in the Official Receiver.[4] No suit can, therefore, be brought in respect of such property by or against the insolvent, but such suits should be brought by or against the official assignee or the receiver. The

19 *Tokendra Bir Singh* v. *Government of India*, A 1964 SC 1663.

1 Section 83 C.P.C.

2 *Mandalsa Devi* v. *Ramnarain R. Ltd.*, A 1965 SC 1718.

3 Section 17, Presidency Towns Insolvency Act.

4 Section 28, Provincial Insolvency Act.

title of the suit should be as follows :

"The Official Assignee of the property of CD, an insolvent".[5]

"AB, Receiver in insolvency of the property of CD, an insolvent".

"AB the Official Receiver for the district of Patna and Receiver of the property of CD, an insolvent".

But the insolvent has a right to bring a suit in his own name and can be sued personally in respect of any property which does not, under the law, vest in the Assignee or Receiver or for damages or costs. An insolvent cannot be sued for debts provable in insolvency without previously obtaining the leave of the court.[6] Notice under section 80, C.P.C. is necessary before a receiver can be sued.

Suits by or against Other Receivers: A receiver appointed by court under O.40, can sue with the leave of the court, and he cannot be sued without such leave, which should ordinarily be obtained before the suit; but the defect of omission to obtain such leave before hand can be cured by subsequent leave.[7] As a general rule when a suit is instituted by or on behalf of a receiver, the authority of the court[8] under which the receiver sues should be specifically alleged in the plaint. Reference to the sanction obtained should also be made in the plaint when a suit is filed against a receiver. A receiver, being an officer of the court, notice under section 80, C.P.C. is necessary before he can be sued. A suit instituted without leave must be dismissed, if objection is taken, but the omission to take objection is tantamount to waiver and the suit cannot be dismissed.[9] A suit may be brought by the receiver in his own name if the court authorises

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5 Section 3, Presidency Towns Insolvency Act.

6 Section 17, Presidency Towns Insolvency Act, and section 28 (2) & (6), Provincial Insolvency Act; In re *Dwarkadas*, 40 Bom 235; *Ghous Khan* v. *Bala*, 15 Mad 833.

7 *Srihari Jana* v. *Satya Charan*, A 1926 Cal 1040 DB; *Karooth* v. *Manavikraman*, 43 Mad 793; *Ram Sarandas* v. *Shanti Devi*, A 1977 All 175; *Md. Gulam Ghouse* v. *A.R. Deshmukh*, (1984) 2 An WR 457; *Subramania Iyer* v. *Rajanunni Nair*, 1987 (2) KLT 998 (Ker); *Horace William Davis* v. *International Investments & Finance Corporation*, (1986) Kant LT 75 (Kant); *Kotani Construction Co.* v. *Anwar Haji Alimohammed*, 1986 (3) Bom CR 454; *Madhavan Sunanda* v. *Krishnan Chetoharan*, A 1988 Ker 228.

8 *See* O.40, R.1 (1) (d).

9 *Satya Kirpal* v. *Satya Bhupal*, 18 CWN 596.

him to do so.[10] Owners of the property are necessary party to such suits.[11]

Suits by or against Minors and Lunatics: A minor or lunatic cannot sue or be sued himself but must sue through a next friend, and if a defendant, a guardian *ad litem* must be appointed by the court to represent him. The only exception is the case of a minor who sues in a Presidency Small Cause Court for his wages or for work done by him as defendant's servant and whose claim does not exceed Rs. 500. Section 32 of Presidency Small Cause Court permits such suits to be instituted without a next friend.

If a person is adjudged lunatic by a court and a curator is appointed, he can sue or be sued by such curator.

If a minor or lunatic is duly represented by a guardian and such guardian is not hostile or negligent or in collusion with the other side, any decree passed in such suit will be binding on the minor or lunatic.[12] This includes a compromise decree where the provisions of O.32, R.7, were duly complied with.[13] But if no guardian was appointed for a lunatic defendant the decree passed is nullity.[14]

Normally the legal guardian would be the next friend to sue on behalf of a minor or lunatic, but where his interest is likely to be adverse to the latter's, then any other suitable person can act as next friend.[15] If a major has been wrongly assumed to be a minor and has sued through a next friend the mistake can be rectified[16] under O. 1, R. 10.

If a plaintiff has not already been adjudicated a lunatic it is not open to the defendant to insist on a finding from the court to that effect at the preliminary stage under O. 32, R. 15 though it is open to the court to

10 *Achut* v. *Shivaji Rao*, A 1937 Bom 294.

11 *Kotani Construction Co.* v. *Anwar Haji Alimohammed*, 1986(3) Bom CR 454.

12 *Bishundeo Narain* v. *Seogeni Rai*, A 1951 SC 280; *Dokku Bhushayya* v. *Katragadda*, A 1962 SC 1886; *Sarda Pd.* v. *Jumna Pd.*, A 1961 SC 1074.

13 *Bishundeo*, supra; *Kaushalya* v. *Baijnath*, A 1961 SC 790; *Dhirendra Kumar* v. *Sugandhi Bai*, A 1989 SC 147, (1989) 1 SCC 85 (compromise filed without considering the interests of the minor, guardian guilty of gross negligence, compromise decree liable to be set aside).

14 *Ramchandra* v. *Man Singh*, A 1968 SC 954.

15 *Thulasi Kumar* v. *Raghavan*, (1985) 1 CCC 38 Ker, A 1985 Ker 20.

16 *Durai* v. *Lakshmanan*, A 1985 Mad 376.

make an inquiry under that rule.[17] But if the plaintiff claims to be insane and sues through a next friend, the defendant can contest the alleged insanity even at the preliminary stage.[18]

If a party attains majority after the institution of the suit, it is for him to come forward to prosecute his suit or defend himself and to apply for discharge of his guardian; and if he fails to do so he is barred from later contending that the decree passed in the case is a nullity.[19] This follows from O. 32, R. 3 (5) in as much as the guardian does not cease to function automatically as soon as the minor attains majority and has to be discharged.

Where a defendant attains majority during the pendency of the suit, on attaining majority he can file a separate written statement, contrary to the written statement filed earlier in the case, the provisions of O. 6, R. 17 are not applicable in such a case.[20]

Mortgage Suits: A mortgage is the transfer of an interest in specific immovable property for the purpose of securing the payment of money advanced or to be advanced as a loan, an existing or future debt or the fulfillment of an obligation which may give rise to a pecuniary liability.

In such suits all persons having an interest either in the mortgage security or the right of redemption shall be joined as parties.[1] It is not necessary that all should be arrayed on one side; it is sufficient that they are all before the court. For instance, one of the several mortgagees can sue if he impleads the others as defendants.[2] The primary parties to the mortgage, as well as those who have acquired the mortgagor's or mortgagee's rights by operation of law or by voluntary transfer, must be impleaded. If a property vests in trustees, they alone are necessary parties and the beneficiary need not be added.[3] The son of mortgagor who has transferred the property is at least a proper party and the suit against the

17 *Godavari* v. *Radha Pyari*, A 1985 Pat 366.
18 *Papi* v. *Rami*, A 1969 AP 362; distinguished in, *Godavari*, supra.
19 *Paritosh Ganguli* v. *Sital Ghosh*, (1985) 89 CWN 441.
20 *Vanimisatti Anil Kumar* v. *Jayavarapu Krishna Murty*, A 1995 AP 105.
1 O.34, R.1; *Mangru Mehto* v. *Taraknathji*, A 1967 SC 1390, *Nagubai* v. *B. Shama Rao*, A 1956 SC 593.
2 *Jamna Das* v. *Maniram*, 162 IC 15, A 1936 Pat 439.
3 O.31, R.1.

transferees without impleading him was not properly framed.[4] A prior mortgagee is not a necessary party to the suit on a subsequent mortgage but a subsequent mortgagee must be impleaded in a suit on a prior mortgage.[5] Other co-mortgagors are necessary parties to a suit for redemption by one of the mortgagors.[6] Attaching creditor is not a necessary party to a mortgage suit,[7] though he is a proper party,[8] and so even an auction purchaser, purchasing property during the pendency of mortgage suit, need not be impleaded.[9]

If a subsequent motgagee is not impleaded,[10] or the prior mortgagee's suit against him is dismissed,[11] his rights remain unaffected by the decree.[12] He can sue for redemption within the prescribed period which was 60 years under Limitation Act, 1908,[13] and is 30 years under the Act of 1963. The prior mortgagee can also bring a separate suit against him.[14] If the omission is objected to at the trial, the suit cannot be dismissed, but a decree can be passed for the sale of property not affected by the subsequent mortgage.[15]

A person claiming a title paramount to that of both the parties should not be impleaded in a mortgage suit,[16] but if such a person has an interest in the mortgage security and his claim is not in any way in derogation of the rights of the mortgagor or the mortgagee, he should be impleaded

4 *Jugraj Singh* v. *Jaswant Singh*, A 1970 SC 1039.
5 *Karrar Hussain* v. *Jai Narain*, 100 IC 198; *Saed-ud-din* v. *Hiralal*, 12 ALJ 619.
6 *Ahmad Husain* v. *Muhammad Qasim Khan*, A 1926 All 46, 24 ALJ 88.
7 *Baijulal* v. *Thakur Pd.*, 19 PLT 781, 1938 PWN 836.
8 *Ittiavira* v. *Krishna*, 28 TLJ 383, 12 TLT 1015.
9 *Lalit Mohan* v. *Hardat Rai*, A 1939 Lah 146.
10 *Sukhi* v. *Ghulam Safdar*, 43 A 469 (475, 476); *Ganpat Lal* v. *Bindasini*, 47 C 924.
11 *Sheo Pd.* v. *Prakash Rani*, 171 IC 434, A 1938 Oudh 10.
12 *Sailendra* v. *Amrendra*, A 1941 Cal 484; *Udhodas* v. *Girdharilal*, A 1941 Lah 96, 193 IC 656; *Rowshan Khan* v. *Abdul Khaliq*, 45 CWN 705, 74 CLJ 1.
13 *Priyalal* v. *Bohra Champaram*, 45 A 268; *Amulya* v. *Raruli*, A 1940 Cal 150.
14 *Nanhelal* v. *Ram Bharose*, 174 IC 315, A 1938 All 115 (discussed. in, *Baijnath* v. *Ramadhar*, 1963 ALJ 214 (FB) on another point.)
15 *Alam Singh* v. *Gokal Singh*, 35 A 484.
16 *Musammat Radha* v. *Thakur Reoti Singh*, 20 CWN 1279 PC; *Gobardhan* v. *Munnalal*, 16 ALJ 639; *Rasoolam Bibi* v. *Ram Kunwar*, 155 IC 156, A 1935 All 205, 1934 ALJ 1177; *Niamba* v. *Narajan*, A 1948 Nag 369.

notwithstanding that his claim is adverse to the plaintiff.[17] A person claiming paramount title, if impleaded, may apply to be discharged. But if he does not apply and an issue is framed about his rights and is decided, it binds the parties.[18] In a suit by a vendee of mortgage rights, the vendor may be joined and relief may be claimed against him personally in case plaintiff fails to get a decree against the mortgaged property.[19]

Suits under Section 92 of CPC : In the case of any alleged breach of any express or constructive Trust, created for public purposes of charitable or religious nature or where the direction of the court is deemed necessary for the administration of any such Trust, the Advocate General or two or more persons having interest in the Trust and having obtained the leave of the court, may institute a suit to obtain any of the reliefs mentioned in section 92 of the Code. The suit must be a representative one, brought by individuals for the benefit of and as representatives of the general public for the purpose mentioned in it and not in their own interest.

The suit being a representative action, is binding not only on the parties to it, but all the persons interested in the Trust.[1] The Court is bound to give such notice to the defendants. An order granting leave to institute a suit under section 92 of the Code without notice to defendants is void.[2]

Interpleader Suits: O.35 deals with interpleader suits. An interpleader suit is an action in which the plaintiff claims no interest in the subject matter in dispute, other than for charges or costs and the dispute is between the defendants *inter se*. But there must be no collusion between the plaintiff and any of the defendants.

Where the plaintiff colludes with one of the claimants or takes indemnity from one of the claimants or enters into an agreement with one of them to receive less than what is actually due, the interpleader suit must be dismissed.[3] Where the amount deposited by the plaintiff is in dispute, the court may declare that the plaintiff is discharged from liability only to

17 *Chettyar* v. *Narayanaswami*, 196 IC 389, A 1941 Mad 710.
18 *Mst. Satwati* v. *Kalishankar*, A 1955 All 4 (FB).
19 *Khat Khata* v. *Surajpal*, 190 IC 334, 1940 OWN 807.
1 *Buddree* v. *Chooni*, 33 Cal 789; *Anand Rao* v *Ramlal*, A 1921 PC 123.
2 *Lakshmanan Chettiar* v. *Narayana Chettiar*, 1990 (I) MLJ 113.
3 *Banuchandra Naidu* v. *Venkata Raju Naidu Charities*, A 1990 SC 444.

the extent of the amount admitted and leave the parties to settle their dispute for the balance otherwise or in other proceedings.[4] Any finding in an interpleader suit will operate as *res judicata*.[5]

4 *Sambiah* v. *Subba*, A 1952 Mad 564; *Harinamarkar* v. *Robin*, A 1927 Rang 31.

5 *Inuganti Subbana Dirao* v. *Muthangi Jaggayya*, A 1966 AP 92; *Abdul Halim* v. *Saadat Ali*, A 1928 Ori 155.(See also precedents Nos.262 and 263 in part II).

Chapter XIII

PLAINT-THE STRUCTURE

A suit is instituted by filing a plaint, which is the first pleading in a civil suit. It is a statement of the plaintiff's claim and its object is simply to state the grounds upon, and the relief in respect of which, he seeks the assistance of the court. It consists of the following three essential parts:

Part I—The Heading and Title

Part II—The Body of the Plaint

Part III—The Relief Claimed

Part I—Heading and Title

Heading : Every plaint should begin with the name of the court in which the suit is brought,[1] to be written at the head of the plaint and this is called its heading, e.g., "*In the Court of the Civil Judge at Allahabad.*" It is not necessary to add the name of the presiding officer of the court. Where a court, e.g., the High Court, has various jurisdictions, the jurisdiction in which the suit is brought should be stated below the name of the court, thus :

In the High Court of Judicature, at Bombay

Testamentary and Intestate Jurisdiction, *or*,

Matrimonial Jurisdiction, *or*,

Ordinary Original Civil Jurisdiction

Then follows the number of the suit in the next line. The number is noted by the court officials and a place should be left blank for it. The year should be written thus :

Original Suit No.—of 1972, *or*,

Title Suit No.—of 1972, *or*,

Suit No.—of 1972,

according to the practice of the court.

Title : Next to the heading, should be written the title or cause title consisting of—

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1 O.7, R.1 (a).

The plaintiff claims Rs.2,000 as general damages for pain and bodily suffering, and Rs.8,000 as special damages, total Rs.10,000 with interest from the date of suit to that of payment.

(*Minor Veeran* v. *Krishnamoorthy*, A 1966 Ker 172). The tort must have been committed by the defendant himself. A tort committed by defendant's guardian cannot be the basis of a suit against the defendant (*Sohanlal* v. *Sree Chand*, A 1941 Cal 247, 194 IC 119). But in certain cases suit will lie against a person for tort committed by his deceased predecessor (for such cases see notes under "Legal Representatives" below). In certain cases, master and principal are liable for torts committed by servant and agent respectively, but government is not liable for the acts of its servants done in the exercise of "Sovereign Powers" (*Kadar* v. *Secretary of State*, A 1931 Oudh 29, 128 IC 77, 7, OWN 1209; *Shanti Prasad Gupta* v. *State of U.P.*, A 1973 All 28). This point has been discussed at length in *Ram Gulam* v. *The Govt. of India U.P.*, 1950 ALJ 46. It is liable if the act is not done in exercise of sovereign powers e.g. commercial ventures (*State of Rajasthan* v. *Mst. Vidyawati*, A 1962 SC 933; *Union of India* v. *Jasso*, A 1962 Punj. 315; *Union of India* v. *Abdul Rahman*, A 1981 J & K 60).

(a) There are two kinds of dangerous animals; (1) those which are presumed to be dangerous, e.g., lions, bears, monkey, elephant, etc., though individuals may be tamed; and (2) those which are presumed to be harmless though individuals may be ferocious and dangerous, e.g., dog, cow, horse, etc., The owner is liable for any mischief done by the former class of animals without proof of knowledge of their ferocious nature, and, in a suit for damages for injury caused by such an animal, it is not necessary to plead defendant's knowledge of its ferocity (*Vedapurti* v. *M. Koppan Nair*, 35 M 708, 21 MLJ 434, 10 IC 108). **It is sufficient to allege that the animal belonged to the defendant and that it caused injury to the plaintiff. But if injury is caused by any animal of the latter class, it is necessary to allege in the plaint (and to prove) that the particular animal was ferocious, and was known by the defendant to be ferocious.** Negligence of the defendant need not be alleged as that is not necessary to be proved to make the defendant liable (*Ganda Singh* v. *Chunnilal*, 29 IC 862, 19 CWN 916). Facts showing defendant's knowledge of the ferocious character of the animal are mere evidence of that knowledge and should not be alleged in the plaint. Chasing by dogs of sheep or cattle which causes real and present danger or serious harm to the animals chased constitutes an "attack" which entitles the owner to take effective means of protection. The right of protection extends even to the extent of shooting the dogs if shooting is necessary for protection of animals against attack or renewed attack (*Cronwell* v. *Sirl*, 1947 All ER 730).

Limitation : Three years under Article 113.

Defence : The defendant may plead that the animal was not ferocious and was perfectly tame, or, in the case of the second class of animals, that he did not know that it was ferocious or vicious. He may plead that the plaintiff had himself

No. 166—Suit for Damages done to Plaintiff's Crop by Defendant's Cattle *(b)*

1. On November 4, 1995, four bullocks belonging to the defendants strayed on to the plaintiff's field No.512 in village Ram Nagar and caused damage to the sugarcane crop growing on the said field and belonging to the plaintiff.

Particulars of Damages

The whole crop was destroyed by being partly grazed and partly trampled by the bullocks. Loss of value of crop at Rs.15,000 per hectare on 2 hectares Rs.30,000.

2. The plaintiff claim Rs.30,000 with interest from the date of suit to that of payment.

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acted in such a manner as to bring the injury upon himself, e.g., that he himself irritated the dog or teased it. He cannot plead that he had lost control of the animal, as his liability continues until some other person has assumed dominion of the animal (*Krishna Rao* v. *Maroti*, A 1936 Nag 272).

(*b*) The owner of an animal is liable for damage caused to another's crop by the animal straying upon the latter's field and it is immaterial whether the animal escapes by negligence of the defendant or in spite of his diligent care (*Holgate* v. *Bleazard*, 1916 WN 431). But he is not liable to an adjoining occupier for their straying where the straying was due to defect in fencing which was the adjoining occupier's duty to maintain, neither is he liable for straying of his cattle on land adjoining highway, when being driven on the highway, unless negligence of the owner is proved (*Madho* v. *Akaji*, 17 IC 899, 8 NLR 190). Therefore in such a suit **all that has to be alleged is the defendant's ownership of the cattle, the straying of the cattle on the plaintiff's land and the damage caused. If field is on a highway, defendant's negligence in allowing the cattle to stray on the field must also be alleged, with particulars.** The damage claimed may be not only the actual damage caused, but compensation for loss of future profits may also be claimed (*Sreebyre Roy* v. *James Hill*, 9 WR 156). In a case of damage done by cattle belonging to several persons, where there was no evidence of conspiracy or to show the amount of damage done by the cattle of each separately, the court awarded nominal damages against each owner (*Har Krishna Lal* v. *Haji Qurban Ali*, A 1942 Oudh 73). The question as to what duty, if any, is cast upon the owner of a land with regard to trespassing animals was considered in *Herbert Richard Fanington* v. *D. Manisami*, A 1950 Mad 58.

The only exceptions to the general law that a person is under no duty towards a trespasser are (1) that he cannot do something which is dangerous to a trespasser if he knows or has reason to believe that the trespasser is already or may be, on his property, and (2) that he cannot do anything to lure on his land and kill animals who

No. 167—Like Suit, when Plaintiff's Field is on a Highway

1. The plaintiff is the Bhumidhar of the field No.512 in village Ram Nagar and had grown wheat and gram crops in the *Rabi* of 1390 *fasli*.

2. The said field is on a highway which goes from Jansath to Mirapur.

3. On February 14, 1995, four bullocks belonging to the defendant, who were being driven along the said highway, strayed through the negligence of the defendant's servant who was incharge of them, on to the plaintiff's said fields and caused damage to the plaintiff's crops.

Particulars of Negligence

The defendant left the said bullocks in the charge of his servant Chhiddu, a lad of 8 or 9. When the bullocks were passing in front of the plaintiff's field, the said Chhiddu left them and went to a neighbouring grove of *berries* where several other boys of the village were plucking *berries* and began to play with those boys and to pluck *berries* without caring to attend to the bullocks, who therefore strayed on to the plaintiff's field.

Particulars of Damage

The plaintiff's crops were partly grazed and partly trampled by the bullocks and the plaintiff lost the value of the whole crop of 2 hectares which was worth Rs.30,000, at Rs.15,000 per hectare.

The plaintiff claims Rs.30,000 with interest from the date of suit to that of payment.

ASSAULT AND BATTERY *(c)*

No. 168—Suit for Assault and Battery

1. On November 5, 1995, the defendant assaulted and beat the plaintiff at the plaintiff's house, by first spitting on his face and then by

would keep outside his land but for allurement.

Limitation : Three years from the date of trespass (Article 87).

Defence : The defendant may plead that the plaintiff was bound to fence his field, or that the cattle strayed from the highway without any negligence of the defendant.

(*c*) Assault is an attempt at battery with a menacing attitude. Battery is the actual beating, or using criminal force, such as spitting on the face, throwing water

striking him with a *lathi* and thus fracturing the *ulna* of his left arm.

2. In consequence, the plaintiff was for a long time unable to transact his business as a pleader and incurred expenses of surgical and medical treatment.

Particular of Special Damage

(1) Expenses of medical treatment :

	Rs.
Fee paid to Dr. Smith for setting the fractured bone	...
Fee paid to Dr. Amba Prasad for assisting Dr. Smith	...
Fee paid to Dr. Smit for . .....visits	...
Fee paid to Dr. Amba Prasad for .....visits	...
Paid to Ramlal Compounder for attendance	...
Paid to Banerji and Sons, Chemists, for price of medicines, bandages, etc.	...
Total	...

(2) Loss of legal practice for one and a half month at Rs.....per mensem... ... ...

over a person, throwing over a chair in which one is sitting, etc. For distinction between mere insult or intimidation and assault, *see Venkata Surya Rao* v. *Muthayya*, A 1964 AP 382. **The plaint must describe the assault or battery, and must also allege the injury caused.** The occasion on which the assault was made and the minute details about the altercation which resulted in the assault should not be alleged in the plaint. The fact that the defendant was prosecuted and convicted or acquitted of the assault is no bar to a civil suit. It should not, however, be alleged in the plaint, much less proved, as the civil suit is decided on independent evidence. But damages awarded by the criminal court should be taken into account in assessing the damages which the plaintiff claims. Plaintiff may claim general and special damages, the former for non-pecuniary losses and the latter for losses computable in money. The nature of these damages is well discussed in *Bharon Din* v. *Phul Chand*, A 1967 MP 48. For mode of assessment of damages in cases of personal injury, see, *Deepa Tewari* v. *Banwari Lal*, A 1968 MP 239; *Swaraj Jotors* v. *T.R Raman*, A 1968 Ker 315 and *Roshan Lal Balle* v. *Sudesh Kumar*, A 1968 J & K 2. Where a 9 year old child died as a result of assault and beating given by a police-officer, the Supreme Court awarded Rs.75,000/- as compensation (*Jay Ram Das* v. *State of Assam*, (1995) 1 Gauhati LR 193).

If the battery causes death, the legal representatives of the deceased can bring a suit for damages under the Fatal Accidents Act (*see* foot note (u) *post*).

The plaintiff claims :

(1) Rs..... general damages for humiliation, pain and bodily suffering.

(2) Rs..... as special damages.

(3) Interest from date of suit to that of payment.

ATTACHMENT

No. 169—Suit for Damages for Wrongful Attachment *(d)*

1. On December 15, 1994, the defendant caused the following property of the plaintiff to be wrongfully attached in execution of his decree No.107 of 1994 of the munsif's court, Basti, against one Ramlal:

(Description of property attached)

* * * *

Such a suit would be possible only when the person causing death is not sentenced to death.

Limitation : Three years under Article 113.

Defence : The defendant may plead provocation, self-defence, accident or consent, as a defence. It is necessary to give particulars of these pleas. But infancy or lunacy is no defence to such a suit.

(d) It is an act of tort to attach property of one person in execution of a decree against another, and the owner is entitled to recover damages. **He should allege the attachment and facts showing that it was wrongful, in addition** to those showing his right to sue. His right to sue may be based on his title to the property or his possession or control over it at the time of attachment (*Jawahar Mal* v. *Punjab National Bank*, A 1936 Lah 524).

It is not necessary to plead that the attachment was made maliciously (*Ramaswami* v. *Muthuswami*, 13 IC 799, 1912 MWN 423; *Kishori Mohan* v. *Harsukh*, 17 C 436; *Firm Mangal Chand* v. *Musammat Zainab*, 90 IC 266, A 1926 All 177; *Kainthessain* v. *L. Pirbhu Lal*, A 1938 All 508; *N. Lobo* v. *Babulal*, A 1925 Nag 390; *Chunnilal* v. *Deo Ram*, A 1948 Nag 118). A decree-holder would, therefore, be liable for his mistake even if he acted in perfect good faith in attaching the property of a stranger (*K.S.R.M. Chattyar* v. *Lakshmi*, A 1940 Rang 43, 186 IC 879). The plaintiff can claim recovery of the property and all the damage which he has sustained by reason of the attachment, whether by loss resulting from default or dishonesty of the custodian of the property, or by the property deteriorating, or by the plaintiff being temporarily deprived of its use, though for recovery of property the procedure of O.21, R.58 would be better. It is not necessary to show that the defendant has taken away the property. So long as it is not available to be delivered back to the plaintiff, the defendant is liable (*Bishambhar* v. *Gaddar*, 33 A 306, 8 ALJ 92, 9 IC

2. The property remained under attachment from December 15, 1994 to February 14, 1995, and the plaintiff has suffered damage.

Particulars of Damage

* * * *

The plaintiff claims Rs.....with interest from the date of suit to that of payment.

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317). Even if no special and actual damage has resulted, or the plaintiff fails to prove the actual damage alleged by him, he can be awarded general damages, which may be nominal, but his suit cannot be entirely dismissed (*Mudhun Mohan* v. *Gokul Dass*, 10 MIA 563).

If, however, the attachment was not wrongful no action would lie even if it was made maliciously (*Haji Nasirudin* v. *Patel Haji*, A 1941 Bom 286). If the attachment is wrongful, and the attached goods are damaged while in the custody of government, the attaching officer in his official capacity and the government were held liable for damages (*Lasalgaon Merchant's Cooperative Bank* v. *Prabhuaas Lasalgaon*, A 1966 Bom 134).

Limitation : For such suits in case of movable property is only one year *from the date of seizure* (Article 80). Date of sale is immaterial, and so are the proceedings under O.21, R.58. But standing crop is not included in movable property and a suit for its wrongful attachment can be brought within three years under Article 113 (*Katagiri* v. *Patabandi*, 21 IC 213). It is not a continuing wrong to which section 22 could be applied but the seizure being illegal *ab initio*, cause of action arises only once, on the date of seizure (*Pannaji* v. *Senaji*, 1930 MWN 305; *Eng Gin Moh* v. *Chinese Merited Banking Co.*, A 1940 Rang 276).

Defence : The defendant may deny plaintiff's ownership of the property, but if the property has been released on plaintiff's objection under O.21, R.58, the defendant cannot have the question of plaintiff's ownership re-agitated (*Jawahar Mal* v. *Punjab National Bank*, A 1936 Lah 524; *K.S.R.M. Chettyar* v. *P.S. Lakshmi*, A 1940 Rang 43, 186 IC 879). He may prove, though it is not necessary to plead, that the special damages claimed have not been suffered. It is no defence to plead innocence, or a *bona fide* mistake of the defendant (*Bhuthnath* v. *Chandra Binode*, 16 IC 443, 16 CLJ 34), though that fact may mitigate the amount of damages, but that is only when the defendant does not try to justify the act (*Bishambhar* v. *Gaddar*, 33 A 306).

He may plead that loss was caused purely by *vis major*, e.g., by storm, rain, earthquake, etc., if it can in no way be attributed to any negligence of the defendant or of any one acting on behalf of the defendant, for instance, if the attached cattle die or are washed away by flood, the defendant would not be liable for their price, provided he had taken all necessary precautions.

No. 170—Suit for Damages for Attachment before Judgment *(e)*

1. The defendant instituted a suit (being suit No.500 of 1984) in the court of the munsif of Agra against the plaintiff, for recovery of Rs.500 due on a bond.

2. In connection with that suit, the defendant on August 4, 1984, applied for, and obtained, an order of attachment before judgment, of the plaintiff's stock-in-trade, and the plaintiff's stock-in-trade, was attached on August 7, 1984 in pursuance of the said order.

3. The defendant obtained the said order maliciously, without any reasonable or probable cause, and on a false allegation that the plaintiff was intending to dispose of his stock-in-trade.

4. The plaintiff suffered damage.

Particulars of Special Damages

Loss of business by reason of the plaintiff's shop remaining closed for two months ... ... Rs. .....

(e) Mere attachment does not give any cause of action, unless it was obtained maliciously and without a reasonable or probable cause (*Nanjappa* v. *Ganpathi*, 35 M 598, 21 MLJ 1052, 12 IC 507; *Gaylord Restaurant* v. *M. Chabbarai*, A 1975 Mad 108). **Malice and want of reasonable and probable cause must, therefore, be alleged, in addition to the fact of such attachment.** Section 95, CPC provides an easier remedy for such cases. The defendant whose property is attached may move the court, by an application to award him compensation for such attachment and can obtain an order simply by proving that the attachment was applied for on insufficient grounds, or, if the suit, in connection with which the attachment order was passed, is dismissed, that there was no reasonable or probable cause for instituting it. The advantage of this summary procedure is the saving of court fees, and the absence of necessity to prove malice. But by an application, the defendant cannot obtain more compensation than the pecuniary jurisdiction of the court, and the determination of an application under section 95 will bar a regular suit.

Limitation : One year from the date of distress (Article 79) or seizure (Article 80).

Defence : The defendant in such a suit may plead that he had sufficient ground for making the application or that he was not actuated by malice. But the fact that the object of the defendant was to enforce speedy payment by putting pressure on the debtor and not to prevent any intended transfer is no defence, as this itself amounts to malice (*Nanjappa* v. *Ganapathi*, 35 M 598, 21 KIJ 1052, 12 IC 507).

The plaintiff claims :

(1) Rs._____ as damages for loss of reputation and credit.

(2) Rs._____ as special damages.

(3) Interest from the date of suit to that of payment.

CONSPIRACY *(f)*

No. 171—Suit for Conspiracy to Defraud Decree-holder

1. Defendant No.2 is the brother of the wife of defendant No.1; defendant No.3 is the son of the mother's sister of defendant No.1; and defendant No.4 is the son of the sister of defendant No.1.

He may plead that the plaintiff had made an application under section 95 which was dismissed. It is no defence that the order of attachment was set aside on notice.

(f) If a combination of persons use unlawful means to achieve their object and damage results to the plaintiff, he will be entitled to sue the persons combining for conspiracy if their predominant purpose was to injure the plaintiff. Further, if the unlawful means employed by the combiners are themselves actionable by the plaintiff, even without the combination, the plaintiff will be entitled to sue the persons combining as joint tort-feasors for the damage caused to him without taking the aid of the tort of conspiracy. If the means employed are not actionable though they are unlawful (*Rohtas Industries Ltd.* v. *Rohtas Industries Staff Union*, (1976) 2 SCC 82; *Lonrho Ltd* v. *Shell Petroleum Co. Ltd.*, (1981) 2 All ER 456 (HL)), then the persons combining to use such unlawful means cannot be sued for conspiracy by the plaintiff suffering damage unless the purpose of the combination was to injure him. But the purpose to injure the plaintiff need not be predominant purpose if unlawful means are used; it is sufficient if it is one of the purposes (*A Lonrho PLC* v. *Fayed*, (1991) 3 WLR 188 (HL); *see also*, Ratan Lal's Law of Torts, 22nd 1993 Reprint Ed. Page 313). The mere fact that two or more persons conspired to do an unlawful or fraudulent act will give no cause of action against them, unless an overt act is committed in pursuance of the conspiracy and special damage is caused to the plaintiff. **The conspiracy, the overt acts committed in pursuance of it, and special damage should be alleged in the plaint.** In a case of conspiracy, all the conspirators will be jointly and severally liable for the whole damage suffered by the plaintiff, irrespective of the fact that the tort was actually committed by only some of them (*Baboran* v. *Chandandhar*, 99 IC 399 Nag).

Defence : The object of the conspiracy may be shown to have been perfectly legitimate, e.g., to safeguard the defendant's own interest (*Rajlal* v. *Kaka & Co.*, A 1985 MP 219). The overt acts may be justified and shown to have been done in the defendant's own right without any fraudulent intention. It may be shown that the

2. The plaintiff obtained a decree against defendant No.1 for recovery of Rs.75,000 (being decree No.125 of 1995), from the court of the Civil Judge at Agra.

3. On September 4, 1995, the plaintiff applied for attachment of the residential house, two transistors and a scooter belonging to defendant No.1. On November 5, 1995, a warrant of attachment was issued by the court, for the sum of Rs.85,450 which was the amount of the plaintiff's decretal debt and costs.

4. Before the issue of the said warrant, the defendants unlawfully and fraudulently conspired and agreed together to defraud the plaintiff and to prevent him from recovering the money due to him under the said decree by means of the said execution.

5. In pursuance of the said conspiracy, the defendants did the following acts :

(*i*) Defendant No.1 transferred his transistors to defendant Nos.2 and 3, and the said defendant Nos.2 and 3 took away the said transistors to their respective houses.

(*ii*) Defendant No.1, sold to defendant No.4 the said house sought to be attached.

(*iii*) Defendant No.2 took away the scooter from the house of defendant No.1 to his own house.

6. For the above reasons, the *Amin* who went to execute the warrant was unable to attach the said movables, and, though the house had been attached, yet it has been released on the objection of defendant No.4 and the plaintiff has thus been unable to recover the amount of his decree.

The plaintiff claims Rs.85,450 as damages, with interest from the date of suit to that of payment.

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plaintiff has not suffered any damage or that the damage claimed is imaginary or too remote.

When conspirators intentionally injure the plaintiff and use unlawful means to do so, it is no defence for them to show that their primary or predominant purpose was to further or protect their own interests; it is sufficient to make their action tortious that the means used were unlawful and their intent was to injure the plaintiff (*A Lonrho PLC* v. *Fayed*, (1991) 3 WLR 188 (HL)).

* see also Trespass and Detention.

CONVERSION OF GOODS* *(g)*

No. 172—Suit for Conversion of Goods Entrusted to the Defendant

1. The plaintiff is the official receiver of the estate of Ram Gopal of Meerut, who was adjudged insolvent on May 3, 1981, in insolvency case No.5 of 1981.

2. Prior to May 3, 1981, the said Ram Gopal delivered two scooters to the defendant that he might sell them.

3. The defendant did not re-deliver the said scooters to the said Ram Gopal or the plaintiff. Since his appointment as receiver, the plaintiff demanded them by registered notice in writing, dated June 20, 1981, but the defendant refused to deliver them, and has sold them and converted the proceeds of sale to his own use.

4. The defendant thereby wrongfully deprived the plaintiff of the said scooters, the value of which was Rs.25,000.

(g) Conversion is wrongful taking or using or destroying of the goods or an exercise of dominion over them, inconsistent with the title of the lawful owner. It differs from trespass in that the latter is essentially a wrong to the *actual possession* and cannot, therefore, be committed by a person himself in possession, while conversion is a wrong *against the person entitled to immediate possession.* Conversion is a wider term than trespass. A mere wrongful taking of the goods is trespass but if the defendant further intends some use to be made of them by himself or by those for whom he acts, or, owing to this act, the goods are destroyed or consumed to the prejudice of the lawful owner, the tort becomes a "conversion". Such an action for conversion resembles one for detention. For difference between trespass, conversion and detention, see *State of Rajasthan* v. *Gangadar*, A 1967 Raj 199. Where goods belonging to the plaintiff were seized by the Land Custom authorities maliciously and without authority of law and the goods were converted into money which was deposited with the Union of India, the plaintiff was held entitled to refund of the money (*Union of India* v. *Sat Pal*, A 1969 J & K 128 DB).

Any appropriation by the defendant of goods, taken possession of by him, whether by trespass or in a rightful manner, is conversion. The plaintiff's remedy is by a claim for damages. **He must allege his right to immediate possession, and the defendant's appropriation of the goods.** He must show a right to immediate possession of the goods and not merely a property in reversion. So an owner of goods lent to another for a term, cannot sue, nor can the owner of goods in possession of another who has lien on them; but any temporary or special ownership with immediate possession, as under a lien, pledge or bailment is sufficient to give a right to sue. **If the property was rightfully in possession of the defendant a**

The plaintiff claims Rs.25,000 damages for such conversion with interest from the date of suit to that of payment.

No. 173—Suit for Conversion by sending Cattle to the Pound

1. On November 20, 1995, the defendant wrongfully seized 4 bullocks belonging to the plaintiff and grazing in the plaintiff's field, and sent them to the pound, where they were detained for 2 days and released on the plaintiff paying Rs. 480 as fees and feeding charges.

2. The plaintiff was deprived of the use of the said bullocks for 2 days and has suffered damage.

Particulars : Hire paid for 4 bullocks hired by plaintiff for ploughing his fields at Rs.30 per bullock per day for 2 days : Rs.240/-.

The plaintiff claims Rs.720 as damages, with interest from the date of suit to that of payment.

COPYRIGHT *(h)*

No. 174—Suit for Infringement of Copyright in a Book

1. The plaintiff is the author of a book in English entitled "The Law of Partnership," and is the owner of the copyright therein.

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demand by the plaintiff or by his authority and a refusal by the defendant should be alleged to prove conversion by the defendant (*Vishva Nath* v. *Bombay Municipality*, A 1938 Bom 410, 177 IC 636), if no overt act evidencing the conversion is shown or can be proved. The amount of damages will be the value of the property on the date of conversion (*Shiva Prasad* v. *Prayag*, 61 C 711; *Srirama Finance Corporation* v. *Chatta Yellaiah Reddy*, (1976) 1 An WR 107). In a case when defendant plucked tea leaves from plaintiff's garden and manufactured tea and sold it, the Calcutta High Court passed a decree for the sale price of manufactured tea as damages and did not allow a deduction for cost of the manufacture (*Carrit Morgan* v. *Manmath Nath*, A 1941 Cal 691). In cases of bonds the value will be that of actionable claims which can be based on them but if they are void damages will be nominal. Additional special damages may be claimed, if reasonable and not remote (*Sitaram* v. *Ishwari*, A 1934 Pat 57).

Limitation : Two years under Article 68, from the date of knowledge of conversion.

(h) The law of copyright is governed by the Copyright Act, 1957. The Copy Right Act, 1957 has been drastically amended by the Copy Right Amendment Act,

2. The defendant has infringed the plaintiff's copyright in the said work by publishing in January, 1995; a literal translation of the said book in Hindi language, and by putting it in the market for sale, without the plaintiff's consent.

1994 (38 of 1994). The pleaders are advised to go through the amended provisions of the Act. Section 14 of the Act gives the meaning of word "Copyright" and section 17 provides who will be the first owner of a copyright. The terms of copyright in various kinds of work are mentioned in Ch. V, consisting of sections 22-29. Registration of copyrights is provided for in Ch. X and infringement thereof in Ch. XI. But registration of work is not necessary in order to entitle the author of literary work to have a remedy for infringement (*Satsang* v. *Kiran Chandra*, A 1972 Cal 533; *Kuman Kanka* v. *Sundarajan*, 1972 Ker LR 536; *Sundarajan* v. *A.C. Thirulok Chander*, (1973) 2 MLJ 290; *Radha Kishna Sinha* v. *State of Bihar*, 1979 Cr LJ 757 Pat; A 1981 All 260; *R. Madhavan* v. *S.K. Nayar*, A 1988 Ker 39; *Misra Bandhu Karyala* v. *Shivratan Koshal*, A 1970 MP 261 dissented from). Civil remedies for infringement are mentioned in Ch. XII and offences relating to the infringement of copyright are dealt with in Ch. XIII. See also TRADE MARK (dd) *post* and Designs Act, 1911.

Where two persons jointly make intellectual contribution in writing a book, they are joint-authors within the meaning of section 20(b) of the Copyright Act (*Najma Heptulla* v. *Orient Longman Ltd.*, A 1989 Delhi 63). Showing of video film of cable T.V. network to subscribers is infringement of copyright (*Garware Plastics and Polyester Ltd.* v. *Telelink*, A 1989 Bom 331). For discussion on Literary Work' in section 2(O) of the Copy Right Act - see *Fateh Singh Mahta* v. *O.P. Singhal*, A 1990 Raj 8.

Artistic copyright-infringement-test-see *Associated Electronics* v. *Sharp Tools*, A 1991 Kant 406 DB). Whether there has been violation of copyright principles and tests pointed out-*R.G. Anand* v. *Delux Films*, A 1978 SC 1613.

The owner of a copyright may sue for its infringement. He may be the original owner or his assignee or exclusive licensee (*Penguin Books* v. *India Book Distributors*, A 1985 Del 29). It also includes the publisher in case of anonymous or pseudonymous works until the identity of the author or authors is established (section 54). If the work is done by an author for consideration for a publisher, the copyright of it would rest in the publisher subject to any contract to the contrary as provided in section 17 of the Act. If copyright has been assigned, it would vest in the assignee (*Khemraj Shrikrishnadas* v. *Garg & Co.*, A 1975 Delhi 130). Assignment of copyright can be made only in writing signed by the owner or by his duly authorised agent (section 19). Oral assignment of copyright is not permissible and is invalid (*K.A. Venugopala Setty* v. *Dr. Suryakantha U. Kamath*, A 1992 Kant 1 (DB)). An assignment of a copyright in a future work takes effect only when the work comes into existence [proviso to section 18 (1)]. But in a case in which the author who used to prepare annual almanacs had agreed to give them to the plaintiff

(*Or*, the defendant has infringed the plaintiff's copyright in the said book by copying out *verbatim*, without the plaintiff's consent, the following portions of the plaintiff's book in his book entitled "Partnership in India" which he has published in January 1995.

1.

2.

3.

etc.).

3. Since the publication of the defendant's said book, the sale of the plaintiff's said book has considerably fallen. The plaintiff estimates this loss at Rs.2,00,000.

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for publication for a period of 5 years, the Madras High Court held that it was a case of equitable assignment and therefore the plaintiff could maintain a suit against a third person to whom the author gave the almanac for publication (*P.R. Vishwanath* v. *Mithukumara-Swami*, A 1948 Mad 139, ILR 1947 Mad 768, (1947) 1 MLJ 382). A mere selling agent cannot bring a suit (*Petty* v. *Taylor*, (1897) 1 Ch 465); nor can a person who is not an exclusive licensee bring a suit in his own name. The exclusive licensee should join with him as the owner either as plaintiff or as defendant. The plaintiff can claim injunction and damages or an account of profits or such other remedies as are or may be conferred by law for the infringement of a copyright (section 55). Injunction can be claimed by showing either that damages have resulted to the plaintiff or there is a probability of damages (*Borhwick* v. *Evening Post*, (1888) 37 CH D 449), and that the defendant is likely to continue his infringement and that this is not simply trivial (*Cox* v. *Land and Water*, 1869 IR 9 Ex. 324). As damages, the plaintiff can claim the loss suffered by him by diminution of sale of his work or the loss of profits which he might otherwise have made. The plaintiff may pray for an account of profits made (*Biren* v. *Keen*, (1918) 2 Ch. 281) by the defendant by sale of his work and may claim the amount of such profits. As this is also in the nature of damages, the plaintiff cannot claim both, this relief as well as damages (*The Tata Oil Mills* v. *Hansa Chemical Pharmacy*, ILR (1979) 2 Delhi 236). The plaintiff is owner of all infringing copies under section 58 and may claim recovery of all infringing copies or damages in respect of conversion thereof. Damages for conversion are not limited to the profits but extend to the full value of copies converted. Damages for conversion on the basis of full price should be specifically claimed and the relief for damages for infringement of copyright will not cover damages for detention of infringing copies (*Biren* v. *Keen*, (1918) 2 Ch. 281). Remedies available are independent of each other and aggrieved parties can sue for all or some relief (*The Tata Oil Mills* v. *Hansa Chemical Pharmacy*, ILR (1979) 2 Delhi 236).

4. The defendant has, in his possession, a large number of copies of the said book complained of as an infringement. The plaintiff demanded the same from the defendant by a notice sent, by post, of September 14, 1995, but the defendant refused to deliver them.

5. The defendant threatens and intends to repeat the infringement of the said copyright of the plaintiff.

The plaintiff claims :

(1) Rs.2,00,000 damages.

(*Or*, that an account be taken from the defendant of the profits he has made by sale of his said book, and a decree for the amount of those profits be passed).

(2) An order to the defendant to deliver to plaintiff all the copies of the said book of the defendant that may be in his possession.

(3) An injunction to restrain the defendant, his agents and servants, from continuing or repeating any such infringement of the plaintiff's copyright, and from doing any act to infringe or injure the said copyright.

The suit should be brought in District Court having jurisdiction (section 62). District Court for the purpose of Sec. 62 the Copyright Act means the District Court as defined in CPC (*Mohan Meakin Ltd.* v. *Kashmir Dreamland Distilleries*, A 1990 J & K 42). The ordinary Civil Court has no jurisdiction in a suit for injunction in defence of a copyright (*K. I. George* v. *Cheriyan*, A 1986 Ker 12). The District Court which will have jurisdiction is the court in whose local limits the plaintiff or where there are more than one, any of them resides. It has been held in *Glaxco Operations* v. *Samrat Pharmaceuticals*, A 1984 Delhi 265, that where the plaintiff company had its registered office at Bombay and a local office at Delhi where it carried on business it was open to it to file a suit at Delhi. A single suit in respect of the infringement of the provisions of Copy Right Act, 1957 and Trade and Merchandise Marks Act 1958, is maintainable (*Jay Industries* v. *Nakson Industries*, A 1992 Delhi 338).

In the plaint **the facts entitling the plaintiff to sue including the capacity, e.g., owner, assignee, licensee, etc., in which he sues and facts showing how the right has been infringed by the defendant should be set up in detail**. Infringement may be proved by providing similarities, omissions, mistakes, plan, phraseology, etc. If direct evidence is not forthcoming but as similarities can be explained by coincidence or common source, evidence must be cogent (*Decks* v. *H.G. Wells*, 142 IC 815, 1933 ALJ 393, A 1933 PC 26). For proving infringement, exact reproduction need not be proved because every intelligent copying must introduce few changes (*K.R.V. Sarma* v. *S. Ganeshan*, 1972 Cr. LJ 1098). The test is whether a colourable imitation has been made (*Misra Bandhu* v. *Shiv Ratan Lal*, A 1970 MP 261). What

DETENTION OF GOODS *(i)*

No. 175—Suit for Movables Inherited by the Plaintiff

1. One Rahim Baksh was, at the time of his death, owner of the movable property entered in the schedule appended to the plaint.

2. The said Rahim Baksh died on November 4, 1995. He left no widow, sister, parents or grand-parents or any issue except the plaintiff.

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has to be seen is whether impugned work is a slavish imitation and a copy of another person's work or it has been produced by author's own labours and exertions (*Shyam Lal* v. *Gaya Prasad*, A 1971 All 192).

The author is the first owner of the copyright (section 17). The person whose name appears on the work as the author or the publisher shall, in proceedings relating to infringement be presumed to be the author or publisher as the case may be [section 55 (2)]. If the defendant wishes to deny that fact he will to do so specifically alleging the grounds on which he bases his denial. For other presumptions in plaintiff's favour in such a suit *see* section 6. "Title" of the work does not involve a literary composition and is not sufficiently substantial to justify protection and is not therefore by itself a proper subject-matter of copyright, but in particular cases a title may be on so extensive a scale and of so important a character as to be a proper subject of protection (*Francis Day* v. *T.O.F. Corporation*, A 1940 PC 55, 187 IC 449). If a plaintiff claims copyright in "title" he should allege such special facts as would support that claim.

Limitation : Three years under Article 88 from the date of the infringement. This is a continuing wrong and secton 22 will apply.

Defence : The defendant may show that the copyright does not subsist in the work, e.g., 50 years have expired since the work was first published, or that the plaintiff is not the owner of the copyright or that his act does not amount to an infringement, and falls under one of the clauses of section 52 of the Act of 1957. He may plead that the work is of a libellous, immoral, obscene or irreligious nature, in which no copyright should be enforced (*Glyn* v. *W.F. Film Co.*, (1916) 1 Ch 261). If the defendant denies the plaintiff's ownership, it is not necessary for him to plead who is the owner. There is at present no law for compulsory registration of books. Copyright also can be registered under Ch. X of Act of 1957, and the entries in the register of copyrights maintained under the Act are *prima facie* evidence of the particulars entered therein. Want of knowledge of infringement of the right of the plaintiff is no defence but defendant may prove that there was no reasonable ground for suspecting that he was infringing the plaintiff's right (*Performing Right Society* v. *Urban Council of Bray*, 1930 AC 377).

(i) Detention or detinue is the tort of wrongful holding of the goods of another. The injurious act being the wrongful detention, and not the original taking

The plaintiff is his only son. The defendant was the kept mistress of the said Rahim Baksh.

3. At the time of the death of the said Rahim Baksh, the defendant took into her possession the said property and has retained it since and deprived the plaintiff of its use and has refused to deliver it to the plaintiff, although, the plaintiff demanded it by a notice sent by registered post on January 20, 1996.

4. The plaintiff has thereby suffered damage.

Particulars

Value of the property as given in the schedule	Rs. 11,000
Loss of profit which the plaintiff would have made by the sale of milk of 2 cows and 2 she buffaloes included in the schedule	3,000

The plaintiff claims:

(1) Return of the said property by the defendant.

(2) Rs. 3000 as damages.

In the alternative, Rs. 14,000 as damages.

No. 176—Suit for Movables Wrongfully Detained

(Form No. 32 , Appendix A, C.P.C.)

1. On the ___ day of _____19__, the plaintiff owned [*or state facts showing a right to the possession*] the goods mentioned in the schedule hereto annexed [*or, describe the goods*] the estimated value of which is _____ rupees.

2. From that day until the commencement of this suit, the defendant has detained the same from the plaintiff.

3. Before the commencement of the suit, to wit, on the ___ day of _____ 19__, the plaintiff demanded the same from the defendant, but he refused to deliver them.

The plaintiff claims:

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or obtaining of the possession. It is immaterial whether they were obtained by the defendant by lawful means, as by bailment or finding, or by a wrongful act, as by a trespass or conversion. The usual evidence of detention is the refusal to deliver or return the goods when demanded. **The plaintiff must have the right to the immediate**

(1) Delivery of the said goods, or ___ rupees, in case delivery cannot be had.

(2) ____ rupees compensation for the detention thereof.

The Schedule

No. 177—Suit for Detention of Goods Hired by the Defendant

1. On December 29, 1995 the defendant hired from the plaintiff a sugarcane crusher on the verbal agreement that the defendant should have the use of the said crusher upto January 31, 1996 and should return the same to the plaintiff not later than February 2, 1996.

2. The defendant has not returned the said crusher to the plaintiff but still detains the same.

3. In consequence of such detention the plaintiff has been prevented from letting the said crusher to other customers and has lost the profits which he would have earned thereby.

The plaintiff claims:

(1) Return of the crusher or Rs.10,000, its value.

(2) Rs.2,000 damages for its detention.

No. 178—Suit for Goods Lent to Defendant

1. On January 20, 1995 the plaintiff lent 2 *daris* of the value of Rs.1,150 and a carpet of the value of Rs.4,000 to the defendant for a period of 15 days.

2. The defendant detained the said goods and has not returned them to the plaintiff, though the plaintiff demanded them from him on February 10,1995.

The plaintiff claims return of the said *daris* and carpet or Rs.5,100, their value.

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possession of the goods at the time of suit arising out of an absolute or a special property, an interest in reversion not being sufficient. Such right should, therefore, be alleged in the plaint in addition to the fact of defendant's detention. The plaintiff may sue for recovery of the specific goods, if the case falls under section 8, Specific Relief Act; in all other cases he must sue for damages. In any case he can add a claim for damages for the detention. Even when he sues for recovery of the goods,

No. 179—Suit for Restoration of Movable Property and Injunction

(Form No. 39, Appendix A, C.P.C.)

1. Plaintiff is, and at all times hereinafter mentioned, was the owner of [a portrait of his grandfather which was executed by an eminent painter] and of which no duplicate exists [*or state any facts showing that the property is of a kind that cannot be replaced by money*].

2. On the ___ day of _____19___, he deposited the same for safe keeping with the defendant.

3. On the _ _ day of _____19___, he demanded the same from the defendant and offered to pay all reasonable charges for the storage of the same.

4. The defendant refuses to deliver the same to the plaintiff and threatens to conceal, dispose of, or injure the same if required to deliver it up.

5. No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [painting].

The plaintiff claims:

(1) That the defendant be restrained by injunction from disposing of, injuring, or concealing the said painting.

(2) That he be compelled to deliver the same to the plaintiff.

EASEMENTS, WRONGS TO *(j)*

No. 180—Suit for Obstruction to Plaintiff's Right of Way *(k)*

1. The plaintiff's grove No.514 is situated to the east of the

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he must in the alternative, claim their value. For the measure of damages see notes on "Trespass to goods" *(ee)* post. In case the goods are of special value and the defendant threatens to destroy them, an injunction may also be claimed.

Limitation : Three years under Article 91.

Defence : The defendant may deny the plaintiff's title to the goods or his right to immediate possession of the goods, or the fact of detention. He may plead that he has a lien on the goods. Particulars of the "lien" should be given.

(*j*) An easement can be acquired by three methods (1) by express or implied grant; (2) by user as of right for the statutory period of 20 years under the Easement

defendant's grove No.513, in village and a public road runs to the west of the defendant's grove.

2. The Plaintiff was and is, entitled to a right of way from his grove No.514 over the defendant's grove No.513 to the said public road, and back from the public road over the said grove No.513 to grove No.514, for himself, his servants, cattle and carts all times of the year.

3. The plaintiff was, and is, entitled to the said right of way by enjoyment thereof for over 20 years before the obstruction of the defendant hereinafter alleged, as of right and without interruption (*or*, by grant thereof from Ramlal, deceased father of the defendant, the then owner of grove No.513, by a deed, dated June 3, 1959].

Act; or (3) by immemorial user based upon the fiction of a lost grant (*Velji Kachrabhai* v. *Bhupatrai*, A 1951 Saurastra 60). It can also be claimed on the basis of a custom. Right to draw water from well, from time immemorial, is customary right and hearsay evidence of immemorial user would be admissible. Such a right is not extinguished if 20 years have not expired from the date of disuse of right till the date of suit (*Maheshwari Prasad* v. *Munni Lal*, A 1981 All 438).

The combined effect of sections 15, 28 and 33 to 35 of Easements Act is that for all practical purposes the principles of an actionable disturbance of an easement are the same in India as in England. Interference with the right of easement may be graded into two degrees : (1) An interference which does not result in substantial damage within the definition of explanation 1 to section 33 and gives no cause of action altogether; (2) an interference which so materially affects the utility of the dominant tenant that injunction would be the appropriate remedy.

A person whose right of easement is disturbed has, in addition to his right of abatement of the disturbance a remedy in an action for damages, or injunction, mandatory or prohibitory or both, according to the circumstances of the case. A claim for damages or compensation is admissible in all cases of disturbance **provided that the disturbance has actually caused substantial damage** to the plaintiff (section 33, Easement Act). If the disturbance is so trivial that no substantial damage is caused to the plaintiff, he has no right of suit (*Gajadhar* v. *Kishorilal*, 13 ALJ 385). The meaning "substantial damage" has been explained in the three explanations appended to section 33. If the disturbance affects the evidence of the easement or diminishes the value of the dominant heritage, it causes "substantial damage". The requirement of **substantial damage should not be confused with "special damage"** and it is not necessary that special damage should be caused to the plaintiff, though if the same have been caused they can be recovered. If "substantial damage" is caused by the disturbance and no special damage have resulted, then the plaintiff can claim general damages which may be nominal or exemplary according to the circumstances of the case (*see* Mayne on Damages, 10th edition, p 437).

[*Or,* if a right of way by necessity is pleaded, paras 1, 2 and 3 should be as follows :

1. The parties were joint owners of the groves Nos.513 and 514 up till 1960, and the way for men, cattle and carts from the highway to the grove No.514 and back from the grove No.514 to the highway lay over to grove No.513 at all times of the year.

2. At a partition held in 1960, the plaintiff became the owner of grove No.514, and defendant of grove No.513.

A claim for injunction can be made in all cases in which a suit for compensation lies and also to prevent a threatened disturbance "when the act threatened or intended must necessarily, if performed, disturb the easement" (section 35). If, however, money compensation is an adequate relief, injunction cannot be granted.

In an action for invasion of the right of easement, therefore, the **plaintiff must allege the existence of the right, with necessary particulars and facts showing its obstruction or disturbance. If the claim is for injunction, "the substantial damage" arising from the disturbance or the apprehension of disturbance from the intended act of the defendant, and in case of a claim for damages, the damage resulting from the disturbance should also be clearly alleged.** As to the mode of pleading easement *see* Chapter VI. In case of obstruction of a public right special injury over and above that suffered by the public should be proved, and therefore, alleged by the plaintiff. Similar action can be brought in respect of right in the nature of easement. It has been held in Lahore that a right to bury the dead in the land of another is not an easement and cannot, therefore, be enforced (*Jiwan Singh* v. *Karamdin*, 103 IC 678 Lah).

The person in possession of the dominant heritage, whether as owner or as occupier can bring the suit, but if the disturbance is of a permanent character, the owner of the heritage can also sue even though, his tenant is in possession. Any one creating the disturbance is primarily liable in such a suit, but so long as the disturbance continues, the persons under whose direction it is created, the persons actually creating it and the persons who are responsible for its continuance are all equally liable, and all or any one of them can be made a defendant. But if a person other than the original creator of the disturbance is sought to be made liable, the suit should be preceded by a request to such person to remove the disturbance. In every case, the liability of each defendant will have to be clearly specified. One of the owners of a dominant tenement can bring a suit to establish the right of easement and for removal of obstruction and other owners need not be impleaded if they do not feel aggrieved (*Kedaruddin* v. *Samsur Mata*, 169 IC 771, A 1937 Cal 335). A customary right is not an easement. A customary right must be recognised by the community, mere user for 30 years is not enough (*Radha Krishna* v. *Tukaram*, A 1991 Bom 119; see also *Amar Singh* v. *Kehr Singh*, A 1995 HP 82).

Limitation : For compensation and injunction is three years (Article 113). In

3. There is no other way from the highway to grove No.514 except over grove No.513, hence the plaintiff claims a right of way for himself, his servants, cattle and carts from the highway to grove No.514 and back, over grove No.513.]

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case of suits to restrain the disturbance by injunction, section 22, Limitation Act, will be a great help as the obstruction is a continuing wrong. If the easement is claimed on the ground of prescription, the plaintiff should prove user within two years of the suit (section 15, Easements Act; *Aktat* v. *Collector of Bareily*, 1933 ALJ 516, A 1933 All 623).

(k) The right of way, may be public or private. Private rights of way are vested in private individuals or owners of particular tenements, and such right arise from grant or necessity. Public right exist in favour of all the members of the public and their origin is dedication. A third kind of right, intermediate between the two, may arise by custom in favour of particular class or the public. That is called a customary right vide section 18 (*Damodar Jena* v. *Pahali Ojha*, 1977 (2) CWR 642). When a right of way is claimed by a particular section of public, they cannot claim it as an easement acquired by prescription or by necessity, but they can claim it either as a public way or as a right acquired by custom (*Rudraganda Basanagonda Harobelabadi* v. *Fakirappa Adiveppa Pujar*, (1981) 1 Karn LJ 355). When the right is alleged to have been acquired by prescription it must be proved to have been enjoyed as "of right" within the period prescribed by section 15 of the Easements Act (*Sajjad Ali* v. *Shabid Ali*, A 1950 All 316; *Mahadevamma* v *M.N.Setty*, A 1973 Mysore 254). Before a right of way can be acquired as an easement it is necessary to prove that (1) there has been an actual enjoyment of the right; (2) that the enjoyment has been open; (3) that it has been peaceful; (4) that it has been as of right; (5) that it has been as an easement; (6) that the easement was enjoyed without interruption and that it has been enjoyed for twenty years. Unless all these ingredients are proved, no right of easement can accrue to the owner of a dominant heritage. Long user of a right of way raises a presumption in favour of the person using the way that the enjoyment has been as of right and when there is no evidence to rebut this presumption, it must be held that the enjoyment has been as of right (*Phool Chand* v. *Murari Lal*, A 1951 M B 89; *Mistry Ali Mohd. Abdulla* v. *Khwaja Abdul Qadus*, A 1976 J & K 23; *C.Mohammed* v. *Ananthachari*, A 1988 Ker 298; *Suresh Chand* v. *Hindu Mal*, A 1991 HP 56).

Neither the Government nor the Municipality or any local authority has got any right to put up any obstruction over the public street so as to prevent it from having any access to the adjoining land. The owner of the land adjoining the public street has got a right of access at every point where his or her land adjoins public street (*K.V.K.Janardhanan* v. *State*, A 1995 Mad 179; *Godavari Bhai* v. *Cannanore Municipality*, A 1985 Ker 2). *Prima facie* the grant of a right of way is the grant of a right having regard to the nature of the road over which it is granted and the purpose for which it is intended to be used, both those circumstances may

4. The defendant on, or about January 1, 1996, unlawfully obstructed the said way by digging a ditch 3 feet deep between his grove No.513 and the plaintiff's grove No.514 and has caused substantial damage to the plaintiff by affecting the evidence of the said easement of way.

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legitimately be called in aid in determining whether it is a right restricted to foot passengers only or a general right of way for animals, carriage and everything else (*Hastimal* v. *Bachhraj*, 1952 BLW 191). Thus a right of way does not necessarily include a right to take a marriage or funeral procession. If such a right is claimed, it must be specifically pleaded (*Ganga Sahai* v. *State*, 1964 ALJ 617). On right of public to use highway see case law discussed in *K.Sudarsan* v. *Commissioner, Corporation of Madras*, A 1984 Mad 29. If the right of way is claimed as easement by way of necessity, it has to be proved that both the tenements are owned by different persons but when a sub-lessee of shop belonging to government claims easement of way through land belonging to government there can be no right of easement in such a case (*The State of Gujarat* v. *Hiralal Motilal Lohar*, A 1980 Guj 146).

The plaintiff must show in the plaint the mode by which he claims to make out a right of way, e.g., by prescription, by grant, or by necessity, etc. It is not sufficient to use these words merely, **but facts must be alleged from which the particular kind of easement can be inferred.** The kind of way claimed should be specified, i.e., whether for pedestrian traffic or for cattle or carts, etc. The **qualification of the right,** *i.e.*, whether enjoyed at particular season or at all times, should also be alleged. **The termini of the way, if it is a private right, must also be indicated, but this is not necessary in the case of a public right.** Where there are no termini, *i.e.*, a point of arrival and a point of departure, such as a blind lane, there can be no right of way (*Pandu* v. *Laxman*, A 1937 Nag 322).

The infringement of the right must next be shown. In the case of a private right, obstruction alone is sufficient, but **in the case of a public right some special damage over and above that suffered by the rest of the public must be alleged, with particulars and details of the damage,** otherwise there will be no cause of action (*Shyamlal* v. *Man Math*, 51 IC 324 Cal; *Sivashanker* v. *Muthu Swamy*, 25 IC 603 Mad; *Surendra Kumar* v. *District Board, Nadia*, A 1942 Cal 360; *Ram Gulam* v. *Ram Khelawan*, A 1937 Pat 481; *Sitaram* v. *Puttolall*, A 1937 Oudh 456, 170 IC 495). The Madras and Lahore High Courts have, however, held that the English rule that no suit can be brought by a person who has not suffered special damage does not apply to India (*Mani Sami* v. *Kupusami*, A 1939 Mad 691; *Ghulam Rasul* v. *Ali Baksh*, A 1936 Lah 132, 161 IC 457; *Municipal Committee, Delhi* v. *Md. Ibrahim*, 152 IC 850, A 1935 Lah 196), and it has been held by the Patna High Court that a person in immediate neighbourhood and entitled to use a local public thoroughfare has a special cause of action irrespective of proof of special damage (*Phalad Maharaj* v. *Gauri Datt*, 171 IC 933, A 1937 Pat 620; *Dasrath* v. *Narain*, A 1941 Pat 249, 192 IC 760; *Dalgobinda* v. *Khatu*, A 1948 Pat 183). What is a special damage is

The plaintiff claims :

(1) Rs.2,200 as general damages.

(2) An order to the defendant to fill so much of the said ditch as would reserve to the plaintiff the right of way which he has been enjoying.

(3) A perpetual injunction to restrain the defendant from the repetition or continuance of the act complained of.

No. 181—Ditto, Statutory form

(Form No 25, Appendix A,C.P.C.)

(Particulars of the right claimed and the obstruction are not given and paragraph 2 is only an inference of law. This form is, therefore, defective).

1. The plaintiff is and at the time hereinafter mentioned was, possessed of [a house in the village of _____].

2. He was entitled to a right of way from the (house) over a certain field to a public highway and back again from the highway over the field to the house, for himself and his servants (with vehicles, *or* on foot) at all times of the year.

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a question of fact. The diminution of the width of public way so as to prevent plaintiff turning his cart as he used to do before, has been held to be a special damage (*Bhagwandas* v. *Town Magt., Budaun*, A 1929 All 767).

But village pathway is not a public right in the full sense but only a quasi-public right and a person can sue in respect of it as a member of the limited class whose special rights have been infringed, and not special damage is necessary to be proved (*Harish Chandra* v. *Harish Chandra*, A 1923 Cal 622 DB; 80 IC 195; *Suresh Chandra* v. *Jamini Kantata*, 96 IC 711; *Ramdahin* v. *Parmeshar*, A 1940 Pat 160; *Bibhuti Narayan Singh* v. *Guru Mahadev*, A 1940 Pat 449, 19 Pat 208; *Dalgobinda* v. *Khatu*, A 1984 Pat 183; *Faquir Chand* v. *Sooraj Singh*, A 1949 All 467; *Harendra Nath Chakrabarty* v. *Asim Sindhu Chakrabarty*, A 1981 Cal 325). In order to establish a village pathway it should be proved that it was used by people as inhabitants of the village and not as members of the public (*Harisadhan* v. *Radhika Pd.*, A 1938 Cal 202, 173 IC 252). Suit can also be instituted on behalf of all members of the class to which the right belongs under O.1, R.8, (*Bibhuti* v. *Guru*, A 1940 Pat 449). But where no suit can be instituted by an individual without proof of special damage he cannot institute it even under O.1, R. 8 on behalf of the public or other persons unless he can prove special damage to the latter (*Surendra Kumar* v. *Dist. Board, Nadia*, A 1942 Cal 360). In any case a suit in respect of a public highway can be brought under section 91 C.P.C. But if suit is based on infringement

3. On the ___ day of _____ 19___, defendant wrongfully obstructed the said way, so that the plaintiff could not pass (with vehicles, *or* on foot, *or* in any manner) along the way (and has ever since wrongfully obstructed the same).

4. (*State special damage, if any).*

No. 182—Suit for Obstruction to a Highway

1. The road leading from the Church to the Railway Station at Muzaffarnagar is a public highway.

2. The defendant heaped *Kankar* in the middle of the said road in front of the Civil Surgeon's house so as to obstruct the said highway.

3. The plaintiff on March 5, 1995 at about 8 p.m. while lawfully passing over the said highway fell over the *kankar* and sustained personal injuries and incurred loss and expense.

Particulars of Injuries and Damages

* * * *

The plaintiff claims Rs.1,600, with interest from date of suit to that of payment.

No. 183—Ditto, Statutory form
(Form No. 26, Appendix A, C.P.C.)

1. The defendant wrongfully dug a trench and heaped up earth and stones in the public highway leading from ___ to ____ so as to obstruct it.

2. Thereby the plaintiff, while lawfully passing along the said highway, fell over the said earth and stones (*or*, into the said trench) and broke his

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of right (of owner of adjoining property) of access to highway he can bring it and section 91 will not bar it (*Godavari* v. *Cannanore Municipality*, A 1985 Ker 2, on right of municipality in highway, see also, *M.A. Pal Mohd.* v. *R.K. Sadarangam*, A 1985 Mad 23).

Defence : The defendant may plead that the plaintiff's user was permissive or secret and cannot, therefore, give a prescriptive right. If the plaintiff has claimed prescriptive right of easement of way, it is good defence that the right was interrupted more than two years before the institution of the suit (*Syed Manzoor Husain* v. *Hakim Ali Ahmed*, A 1980 All 389). He may show that the plaintiff's way has not been substantially obstructed as he can still pass over land. There can be no right of wandering all over a large plot of land and if a small way is left, which is quite

arm, and suffered great pain, and was prevented from attending to his business for a long time, and incurred expense for medical attendance.

No. 184—Suit for Obstruction to the Right of Flow of Rain Water and Dirty Water *(l)*

1. On the west of the plaintiff's house in *mohalla* Goala Sarai, in the town of Aligarh, lies a vacant piece of land belonging to the defendant.

2. In the western wall of the said house there was a *mori* (*or*, an outlet for water) which discharged the water of the plaintiff's latrine on the ground floor, on to the said land of the defendant. On the roof of the plaintiff's house there were three *parnalas* or spouts through which the rain water from the roof of the plaintiff's house used to be discharged on the defendant's said land.

3. The plaintiff had been discharging the said latrine water and the rain water from his said house through the aforesaid *mori* and *parnalas* respectively on to the said land of the defendant for over 20 years before the defendant's obstruction hereinafter alleged, as of right and without interruption.

4. On or about June 15, 1995, the defendant has built a wall on the said land close to the western wall of the plaintiff's said house and has thus obstructed the flow of the said water of the plaintiff.

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sufficient for the plaintiff's purposes, there can be no cause of complaint (*Golcuk* v. *Tarinee*, 4 WR 49; *Doorga* v. *Kalley*, 7 C 145). If plaintiff has not perfected right of way by use for the period of 20 consecutive years within two years next before institution of suit, the suit to establish prescriptive right of way should be dismissed (*Bansh Narayan Misra* v. *Batuk Nath Sharma*, 1982 All LJ 111). There can be no easement of necessity when alternative way is available to the claimant of the right (*Ramesh Chandra Bhukhrabhai Patel* v. *Maneklal Maganlal Patel*, A 1978 Guj 62, *Sukhdei* v. *Kedearnath*, 33 All 467).

(l) A right of higher land to discharge rain water on lower land is a natural right. A proprietor of higher land is entitled to collect the water falling on his land and to drain it on to his neighbour's land on a lower level by making *moris* in his boundary wall (*Gibbons* v. *Lenfestey*, A 1915 PC 165; *Waniram* v. *Karam Singh*, 1993 MPLJ 347 MP). But the upper proprietor has no right to increase the burden on the neighbour's land by discharging the water with greater force and in a more accumulated form than it would have received if the water had been allowed to flow in a natural way (*Tej Kishan* v. *Akhlaq Husain*, A 1949 All 184). A right to discharge such water through an artificial contrivance such as a spout or artificially created

5. In consequence of the said act of the defendant, the water of the plaintiff's latrine could not flow out and became stagnant and has been a source of great discomfort to the plaintiff and injury to his health, and has thus caused substantial damage to the plaintiff.

The plaintiff claims :

(1) An order to the defendant directing him to remove his wall in such a way as not to obstruct the flow of the plaintiff's said water.

(2) A perpetual injunction to restrain the defendant from a repetition of any act calculated to obstruct the flow of the said water.

(3) Rs.1000 as general damages.

No.185—Suit for Obstruction to Light and Air *(m)*

1. The plaintiff is, and at all material times hereinafter mentioned was, the owner in possession of a dwelling house bounded as follows in Raja Ki Mandi in the town of Agra, having windows on the west side thereof :

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water course is one which can be acquired as an easement (*Tharur Panchayat* v. *Kunchavi*, A 1978 Ker 50). Whether the right of throwing filthy water on neighbour's land can also be acquired as an easement has been answered in the affirmative in *Ramasubbier* v. *Mohomed*, A 1937 Mad 823; *Tharur Panchayat* v. *Kunchavi*, 1977 KLT 742, A 1978 Ker 50, but in other cases it has been observed that law does not permit acquisition of a right to perpetuate a nuisance day in and day out on somebody else's land (*Swami Nath* v. *Sheo Ratan*, 1981 AWC 79; *Kailash Chand* v. *Gudi*, A 1990 HP 17; *Prabhu Narain Singh* v. *Ram Niranjan*, A 1983 All. 223; *Jag Narain* v. *Ram Dularey*, A 1979 All 71; *Bankey Lal* v. *Krishna Lal*, A 1967 All 43; *Bheru Lal* v. *Mohan Singh*, A 1966 Raj 123; *Gopal Krishna Sil* v. *Abdul Smad Chaudhari*, A 1921 Cal 569 DB; *Mangat Ram* v. *Sirajul-hasan*, A 1924 Lah 492). If an easement to flow or discharge such water is established, the plaintiff can claim not only to have the obstruction to such right removed but also damages resulting from the obstruction. It is no defence that the plaintiff can discharge the water more conveniently towards another direction, but it is a good defence to a suit for closing new spouts that they do not impose an additional burden on the servient heritage (*Sakharam* v. *Sakharam*, 20 NLJ 99).

(*m*) It must be remembered that the easement of receiving light and air by prescription differs from other easements in this important point that a person does not acquire an absolute right to the whole amount of air and light which he has been enjoying. He obtains a right to so much of it as will suffice for the ordinary purpose of inhabitancy or business according to the ordinary notions of mankind having regard to the locality and surrounding (*Peter Charles Paul* v. *William Robson*, 12

Boundaries of the House

* * * *

2. He has been enjoying the use of light and air to, and for the said house through the said windows, for a period of over 20 year before, and up to, the time of the obstruction hereinafter complained of, as of right and without interruption.

3. The defendant, on or about January 1, 1996, erected a high wall near the said windows and has thereby completely prevented and obstructed the light and air from entering into the said house by the said windows thus rendering the plaintiff's said house unfit for comfortable dwelling.

[*Or*, the defendant has, on or about January 1, 1996 erected a wall which has in a material degree diminished and obstructed the light and air from entering the said house by the said windows.

4. The plaintiff is a tailor by profession and used to carry on his business, as a tailor, in the said house. The said partial obstruction of light

ALJ 1166, 42 C 46, 18 CWN 933, 1 LW 561, 1914 MWN 631, 16 BLR 803 PC; *Rajani* v. *Nirmal*, A 1946 Cal 438) and no interference is actionable unless it is of a substantial character (*Wali Mohammad* v. *Batuk*, 163 IC 843, A 1936 All 517; *Abdulla* v. *Municipal Corpn., Karachi*, A 1936 Sind 39, 179 IC 884; *Babu Shiv Pratap Singh* v. *Prem Narain Jaiswal*, 1978 All LJ 304; *Bhulwati Devi* v. *Munna Lal*, A 1982 All 20). He can claim no more air than is necessary and, under the Indian Easements Act, he can have no cause of action unless the diminution interferes with his physical comfort (section 33, Exp. III), and such interference must be alleged in the plaint. It is not necessary that the obstruction should render the house insanitary, but where the Easements Act does not apply, e.g. in Bengal, this would be necessary as under the English Law a cause of action is not complete without proof of the fact.

Similarly, mere diminution of light does not give a cause of action. It must be shown, and also alleged in the plaint, that either (1) the obstruction affects the evidence of the easement, or (2) it materially diminishes the value of the dominant heritage, or (3) it interferes materially with the physical comfort of the plaintiff, or (4) it prevents him from carrying on his accustomed business as beneficially as he had done previously (section 33). If the last mentioned ground is taken the plaint must show the business which the plaintiff was accustomed to do in the dominant heritage and how it is affected by the obstruction of light. In places where the Easements Act does not apply, the test is whether the obstruction amounts to a nuisance, and in such cases it should be alleged that the diminution of light has rendered the house unfit for comfortable habitation (*Delhi and London Bank* v. *Hem Lal Dutt*, 14 IC 39; *Hiralal* v. *Mohadra*, 57 IC 706 Cal). Easementary right to

prevents him from carrying on his business, as such tailor, in the said house, as beneficially as he had been previously doing and the said obstruction to air materially affects the physical comfort of the plaintiff].

4. (*Or* 5). The said obstruction of the light and air has materially diminished the value of the plaintiff's said house. Formerly the house was worth Rs.75,000 but now it is worth not more than Rs.50,000.

5. (*Or* 6). The plaintiff's has suffered damage by the said obstruction.

Particulars

	Rs.
Rent of another house which the plaintiff had to take for residence and business since the said obstruction, for 5 months at Rs.210 per month.	1050

vertical light and air is recognised but there is no question of a person having right of light or air coming to his property laterally (*Dr. K.Panduranga Nayak* v. *Jayashree*, A 1990 Kant 236).

In a suit for injunction restraining the defendant from obstructing light and air of a window of the plaintiff's house, the plaintiff cannot succeed on the mere presumption that by closing down of the disputed window, specific injury should be deemed to have been caused to him. Such a presumption cannot be raised in view of the language of section 33 and 35, Easements Act (*Jamna Das* v. *Gulraj*, A 1952 Raj 1). As to when a plaintiff can get damages, when injunction and when both, see *Mt. Panna* v. *Ram Saran*, A 1933 All 492, 1933 ALJ 1006, 145 IC 530; *Ellerman* v. *Pazundang*, A 1933 Rang 351. No such easement can be claimed through an aperture in a joint wall (*Narayan* v. *Shankar*, 174 IC 944, A 1938 Bom 215, 40 BLR 115). If the case is based on obstruction affecting the evidence of easement, the obstruction should be specially alleged. Damages can be awarded for such obstruction e.g., blocking of one of the windows, even if it does not cause any diminution of light and air and no actual damage (*Sofia Bidi* v. *Vasudev*, A 1940 Mad 952).

Defence : The defendant may plead that the interference to the plaintiff's right is not sufficient according to the above standard or, in a suit for mandatory injunction (but not in one for damages), that the suit has not been brought promptly and the plaintiff has been guilty of *laches* (*Sultan* v. *Rustamji*, 20 B 704; *Benode* v. *Sondaminery*, 16 C 252), and may raise any of the general pleas relating to easements. He may pleads that, in any event, the whole of the obstruction need not be removed, as plaintiff is not entitled to the whole light and air but only a small portion would be enough for him. Mere existence of other sources of light is no defence unless the plaintiff has acquired a prescriptive right to light from those sources (*Jadooie* v. *Kisum*, 105 IC 39 Pat; *Mohamed Zaman* v.*Malikumar*, 165 IC 219, A 1936 Lah 792).

The plaintiff claims :

(1) A mandatory injunction requiring the defendant to demolish so much portion of his wall as obstructs the said light and air of the plaintiff.

(2) Rs.1,050 damages.

(3) Future damages at Rs.210 per month up to the day the obstruction is removed.

(4) In the alternative, Rs.25,000 as damages, for depreciation in value of the house.

No. 186—Suit for Interference with a Right of Privacy *(n)*

1. The plaintiff is, and at all material times hereinafter mentioned was, the owner of the house bounded as follows in *mohalla* Maithan in the town of Agra, and has, since its construction, more than 50 years ago, been using it as a dwelling house for himself and his family members, including ladies.

2. The ladies of plaintiff's household observe complete *pardah* and do not appear before the public, and they have been enjoying this seclusion from outsiders, while residing in the said house.

3. The defendant has on or about February, 1 1996 ,built a room on the upper storey of his house to the east of the said house of the plaintiff, and in the western wall of the newly built room he has opened three

(n) There is no inherent right to privacy but such a right can be acquired by prescription, grant or local usage (*Kesho* v. *Mt. Muktakiran*, A 1931 Pat 212, 133 IC **enjoyed, and also that the defendant's act substantially interferes with such privacy** (*Gokul* v. *Radha*, 10 A 358; *Mt. Janki* v. *Bhagwan Din*, 94 IC 914, 29 OLJ 136) and without such allegations of the existence of the customary right and of his right to the advantage of it, the suit will fail (*Bhagwandas* v. *Zamarrud Hussain*, 1929 All LJ 1028, 51 A 986; *Bhulan* v. *Altaf*, 1946 AWR 272, A 1945 All 335) The Oudh Court has, however, held that the custom is so well established in these provinces that the courts are entitled to take judicial notice of it (*Baqridi* v. *Rahim Bux*, 93 IC 332, A 1946 Oudh 352). Some Allahabad rulings have also taken the same view as the Oudh court (*B.Nihal Chand* v. *Mst. Bhagwan Dei*, A 1935 All 1002 and *Mst. Daropadi Devi* v. *S.K. Dutt*, A 1957 All 48). The fact that the houses are separated by a public road does not prevent the existence of a right of privacy (*Sardar Husain* v. *Ahmad Husain*, 110 IC 693 Oudh). The Madhya Pradesh High Court has held that the custom has got to be strictly proved. Even if custom is proved an injunction cannot

windows overlooking the residential rooms, the courtyard and the kitchen of the *zanana* portion of the plaintiff's said house.

The plaintiff claims :

(1) That a mandatory injunction be issued to the defendant to close the said windows.

(2) That an injunction be issued to restrain the defendant from doing any act in invasion of the plaintiff's right of privacy attached to the said house.

No. 187—Suit for Diverting of Water-Course

(Form No. 27, Appendix A,C.P.C.)

1. The plaintiff is, and at the time hereinafter mentioned was possessed of a mill situated on a [stream] known as the_____ in the village _____, district of_____ .

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be granted unless it is established that there has been a substantial infringement of the right of privacy (*Abirchand Gulab Chand Jain* v. *Monik Ramnarain Tailor*, 1978 MPLJ 204). The plaintiff has to prove that he has been enjoying the right of privacy. So where his premises are already overlooked from the roof of the defendant's house as well as other adjacent houses he cannot claim a right of privacy and cannot complain of further invasions (*Shiv Lal* v. *Ram Narain*, 3 IC 88 All; *Mst. Karimannissa* v. *Mira Baksh*, A 1929 All 809, 119 IC 834). But on the ground that looking out of a window does not attract the attention of the inmates of the plaintiff's premises to enable them to seclude themselves, while looking from the roof does, it has been held that even if a house is overlooked from other sides, the opening of additional apertures would nevertheless be an infringement of the right of privacy and may be restrained (*Kunj Behari* v. *Brij Behari*, A 1947 Oudh 139; *Abdul Rahman* v. *Bhagwandas*, 29 All 582). The right of privacy must be pleaded and proved. If the defendant opens any new window, the plaintiff is fully entitled to block the same by raising the height of his wall, and the defendant is not entitled to break or damage the said wall or any portion thereof so as to remove the obstruction to his new window (*Anguri* v. *Jiwan Dass*, A 1988 SC 2024). The right is not restricted to Indians alone, but it has been recognised even in favour of European ladies (*Abdur Rahman* v. *D. Emile*, 15 A 69); but not in favour of males (*Bhullan* v. *Altaf*, A 1945 All 335). Right of privacy may exist only in respect of inner courtyard, the custom should be in the circumstances reasonable and the court will see whether it has not fallen into disuse (*Diwan Singh* v. *Inderjeet*, A 1981 All 342). In *Busai* v. *Hasan Raza*, A 1963 All 340, it was held that in view of the changed social conditions the older decisions based on *purdah* system were no longer valid.

Such a suit can be brought either by the owner or by the lessee of a house. All that the plaintiff can claim is the protection of this right and if the same can be

2. By reason of such possession the plaintiff was entitled to the flow of the stream, for working the mill.

3. On the ___ day of _____ 19___, the defendant, by cutting the bank of stream, wrongfully diverted the water thereof, so that less water ran into the plaintiff's mill.

4. By reason thereof the plaintiff has been unable to grind more than _____ sacks per day, whereas, before the said diversion of water, he was able to grind _____ sacks per day.

The plaintiff claims that the defendant be restrained by injunction from diverting the water as aforesaid.

No. 188—Suit for Obstructing a Right to Use Water for Irrigation

(Form No. 28, Appendix A, C.P.C.)

1. Plaintiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, etc., and entitled to take and use a portion of the water of a certain stream for irrigating the said lands.

2. On the ___ day of _____ 19___, the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream.

FALSE IMPRISONMENT *(o)*

No. 189—Suit for False Imprisonment

1. The defendant No.1 is an Executive Engineer employed in the

secured without total removal of the offending constructions, it is not necessary to order total removal (*Fazal Haq* v. *Fazal Haq*, 26 ALJ 49). The Court will always take into consideration the extent and degree of privacy to which the plaintiff is entitled under the circumstance of a particular case (*Sardar Husain* v. *Ahmad Husain*, 110 IC 693).

Defence : The defendant may show that the right of privacy has not been substantially enjoyed by the plaintiff as plaintiff's house is overlooked from several, other houses in the neighbourhood (*Shib Lal* v. *Ram Narayan*, 3 IC 88; *Mt. Karimunissa* v. *Mira Baksh*, 119 IC 834, A 1929 All 809), or that the interference is not substantial. It is no defence that the plaintiff can help himself by raising his own walls. But the right of privacy cannot be carried to an offensive length. It can also be pleaded that the custom has fallen into disuse.

(o) Restraint of the liberty of a person without lawful excuse is false

Irrigation Department, and on November 14, 1995 was encamping at Bagrasi in the district of Bulandshahr.

2. On November 14, 1995, the plaintiff was passing near the tent of the defendant No.1 when the said defendant No.1 arrested and detained the plaintiff for two hours and afterwards gave him into the custody of defendant No.2 who is a police Sub-Inspector at Siyana, on a false charge of having abused the son of defendant No.1.

3. The plaintiff offered to give his correct name and address to the defendant No.2, and to execute such bond to appear before a magistrate as the said defendant No.2 might direct but the said defendant No.2 refused to release the plaintiff, and took him in custody to Bulandshahr and after keeping him in wrongful confinement for 26 hours produced him before the Judicial Magistrate of Bulandshahr.

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imprisonment. It must be shown that the plaintiff was arrested or detained, either by force or by show of force or authority, without any lawful excuse or authority. The arrest is wrongful and actionable if it is made without authority of law, and without a warrant, or by an illegal warrant or by a legal warrant executed in an unlawful manner, and all that should be alleged in a suit for false **imprisonment are facts showing that imprisonment was unlawful. It is not necessary to prove that it was made maliciously.** The motive for the arrest need not therefore be alleged in the plaint (*Ram Pyarelal* v. *Om Prakash*, ILR (1977) 1 Del 549). False imprisonment is actionable without proof of special damage and it is not necessary for a person unlawfully detained to prove that he knew that he was being detained or was harmed by his detention (*Murray* v. *Ministry of Defence*, (1988) 2 All ER 521 HL).

Judicial Officers are exempt from liability for what they do in the discharge of their judicial duties, provided they, in good faith, believe they have jurisdiction to do that act (Act XVIII of 1850). For this purpose "Jurisdiction" means not the power to do or order the act imputed but generally his authority to act in the matter (*Anwar Hussain* v. *Ajoy Kumar*, A 1965 SC 1651). If he acted within his jurisdiction, even malice will not make him liable (*Girija Shanker* v. *Gopalji*, 30 B 241). The plaintiff should simply give the fact of his arrest or imprisonment and, if it was made by a public officer, facts showing that he had exceeded his authority. It is for the defendant to prove lawful justification (*Ram Pyare Lal* v. *Om Prakash*, ILR (1971) 1 Del 549).

The private person who moves a public officer to arrest or imprison a wrong person, is liable, if he has taken an active part in such arrest or if he obtains the warrant fraudulently and improperly. But if the defendant has place l all the facts before the officer having the discretionary power to order such arrest he is not responsible if the officer with full knowledge of all the facts, exercised his discretion and ordered the arrest (*Thakdi Haji* v. *Budrudin*, 29 M 208; *Balbhaddar* v. *Basdeo*,

The said Magistrate on November 16, 1995, discharged the plaintiff from custody, on the plaintiff executing a personal recognisance, to appear when called upon.

The plaintiff claims Rs.10,000 as general damages for disgrace, humiliation, physical discomfort and mental suffering.

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29 A 44; *Graham* v. *Henry Gidney*, 60 C 955, A 1933 Cal 708). In such cases, if the plaintiff has been prosecuted unsuccessfully, a suit for malicious prosecution will lie. The distinction between these two kinds of suits should be carefully remembered; **if a man himself arrests or moves a ministerial or police officer to arrest another, he may be liable for false imprisonment**, and the plaintiff will be entitled to a decree without proof of malice or want of reasonable or probable cause. It will be for the defendant to prove facts justifying the arrest and the existence of reasonable and probable cause, if the same is a justification. But **if the defendant has made a charge before a Magistrate or a Judge, and the latter has ordered the arrest of the plaintiff, or has remanded him to custody, the defendant is not liable for false imprisonment**, but may be liable for malicious prosecution, in which case the plaintiff has to allege and prove not only his prosecution and the injury resulting from the same, but also that the defendant acted maliciously and without a reasonable or probable cause in prosecuting him (*Nagendra* v. *Basanta*, 57 C 5). The reason is obvious; imprisonment is a tort, unless justified; prosecution is not a tort, unless it was malicious and made without a reasonable or probable cause (*Austin* v. *Dowling*, LR 5 CP 534, 540; *Hicks* v. *Faulkner*, 8 QBD 167, 170). In order to succeed in a suit for damages for wrongful arrest and detention, it is not necessary for the plaintiff to prove malice and want of reasonable and probable cause on the part of the defendant in causing his wrongful arrest and detention (*Lalta* v. *Asharfi Lal*, A 1948 Oudh 135; *Bimal Prakash* v. *U.P.State*, 1969 ALJ 276).

If a man arrests another or causes a constable to arrest him and then unsuccessfully prosecutes him before a magistrate, that is a case both for false imprisonment and malicious prosecution and the element necessary for supporting the claim on each ground should be mentioned in the plaint. In such cases damages may be separately assessed and claimed for each act of tort (*Nurkhan* v. *Jiwandas*, 99 IC 638, A 1927 Lah 120). The principal heads of damages in a suit for false imprisonment would be the injury to liberty, that is, the loss of time considered from non pecuniary view point and the indignity, mental suffering, disgrace and humiliation with any attendant loss of social status (*Sailajanand Pande* v. *Suresh Chandra Gupta*, A 1969 Pat 194). Damages in a case of false imprisonment cannot be nominal but must be substantial. The damages may be aggravated if the defendants have acted in a high handed manner and caused more than usual amount of suffering and the defendants did not express any regret. The damages can be mitigated if the defendants act *bonafide* and express repentance for the wrong done by them at the earliest opportunity (*Ram Pyare Lal* v. *Om Prakash*, ILR (1977) 1 Delhi 549, 1977 Cr. LJ 1984 Del). Status is a relevant factor in assessing damages (*Nihal Singh* v.

No. 190—Suit for Moving a Police Officer to make Arrest

1. On October 14, 1995, the defendant made a false report of theft against the plaintiff at the Budaun *Kotwali* police station and requested the Sub-Inspector in charge of the said police station to arrest the plaintiff.

2. On the said report and the said request of the defendant, the said Sub-Inspector arrested the plaintiff on October 15, 1995, and kept him in the lock up for 24 hours, after which the said Sub-Inspector released the plaintiff.

The plaintiff claims Rs.5,000 as general damages.

Partap Singh, 1965 ALJ 805).

Limitation : One year from the time when the imprisonment ends vide Article 73. For malicious prosecution the limitation under Article 74 is one year from the date of acquittal or termination of the prosecution.

Defence : Facts justifying the act, e.g., that the defendant acted in defence of his property on which the plaintiff was trespassing or that he acted in discharge of his official duties or under order of a superior officer, may be pleaded. Arrest and imprisonment by public officer can be made only in certain specified circumstances, e.g., a police officer can arrest without a warrant in cases mentioned in sections 41, 42 and 151, Cr. P.C. and section 34, Police Act. If the defendant is a public officer, he must allege all facts showing that his act was within his legal powers, with such particulars as may be necessary. If the defendant seeks protection of the Judicial Officer's Protection Act, he must show-(1) that the imprisonment was ordered by him in discharge of his official duties, and (2) that the order was made within the limits of his jurisdiction, or, if not within those limits, that he, at the time, in good faith believed himself to have jurisdiction to make the order. The existence of a reasonable cause for the act complained of supplies the ground for the existence of good faith (*Rohini Kumar* v. *Niaz Mohammad*, A 1944 Cal 4).

A private person's powers of arrest in India are more defined and restricted than in England, and the general law on the subject is to be found in section 43, Cr. P.C. The only defence of a private person can therefore be either that the plaintiff was proclaimed offender, or that the plaintiff had committed a cognizable and non-bailable offence, in his presence (*Nazir* v. *Rex*, A 1951 All 3). If the offence was not committed in his presence, the arrest cannot be justified, even if the offence has really been committed and even if the defendant has reasonable cause for suspecting it. An issue of a reasonable and probable cause is, therefore, immaterial in such cases (*Gouri Prasad* v. *Chartered Bank*, A 1925 Cal 884, 52 C 615). If, however, a private person moves a police officer to arrest another person, and the police officer arrests the latter, not on his own responsibility and not after his own investigation and exercise of his own discretion, but on the motion of the private person alone, the latter must prove that he had reasonable ground for

No. 191—Suit for Arrest before Judgment *(p)*

1. The defendant instituted a suit No.141 of 1986 in the Court of the Munsif at Muzaffarnagar, against the plaintiff for recovery of Rs.2,000.

2. In connection with the said suit, the defendant obtained an order of arrest before judgment on January 15, 1986, from the said court, on the allegations that the plaintiff was going to leave India and had no property in India.

3. The aforesaid allegations were false, as the plaintiff had no intention to leave India and owned and still owns house worth Rs.1,50,000 at Meerut.

4. The defendant obtained the said order maliciously and without any reasonable or probable cause.

5. The plaintiff was arrested in pursuance of the said warrant, and was released, on furnishing security, after 12 hours.

6. The plaintiff was, by the said arrest, considerably disgraced and has suffered damage to his credit and reputation.

The plaintiff claims Rs.10,000 as damages.

FRAUD *(q)*

No. 192—Suit to Set Aside a Decree on the Ground of Fraud *(r)*

1. The defendant has obtained an exparte decree against the plaintiff

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suspecting that the person arrested had committed an act for which the police officer was entitled to arrest him and, in making this allegation, should give particulars of the reasonable and probable grounds. In the case of *Gauri Prasad* v. *Chartered Bank* supra, Page J., however, went further and held that even the existence of a reasonable and probable cause will be no justification when the offence was not committed in the defendant's presence because the arrest by a police officer in the presence of and at the investigation of the defendant should be regarded as arrest by the defendant himself which could not be made except under section 59, Cr. P.C. (now section 43). But in any case, if the police officer makes the arrest after making his own investigation, the mere fact that he did so on the report of the defendant would not make the defendant liable (*Balbhaddar* v. *Basdeo*, 29 A 44).

(*p*) See note *(e) ante* about attachment before judgment. The same applies *mutatis mutandis* to arrest before judgment.

(*q*) Fraud and misrepresentation are acts of tort which give a cause of action

from the Court of the Civil Judge of Monghyr (being decree No.557 of 1993), on February 5, 1994.

2. The said decree was obtained by the defendant by fraud. The following are the particular of the said fraud :

(i) The defendant made statement in the plaint that the plaintiff was a resident of village Talra, and got the summons issued against the plaintiff to village Talra. When the summons was returned with the report that the

provided they result in any damage to the plaintiff. If no damage is caused to the plaintiff, fraud or misrepresentation furnishes no cause of action. An actionable fraud of misrepresentation consists of the making of a wilfully false representation of a fact made with the intent that the plaintiff should act on it and of the plaintiff acting on it and suffering loss. A representation, if *bona fide*, is not actionable even if it was made negligently provided it was not made recklessly without caring whether it was true or false (*The United Motor Finance Co.* v. *Romar Dan & Co.*, A 1937 Mad 897). The object of a plaintiff in a suit on the ground of fraud is to be restored to the same position in which he was before the fraud was committed, or in which he would have been, had the fraud not been committed. This object may be achieved by a declaration of the invalidity of a transaction which is the result of fraud, by cancellation of a document, by rescission of a contract or by recovery of damages. **Fraud must be specifically alleged with full particulars** (*vide.* Chapter VI, Part I). **It should be clearly alleged in the plaint that the particular transaction was the consequence of the fraud, and that the defendant is either the perpetrator of the fraud, or an abettor in its perpetration or one who has accepted some benefit under the fraudulent transaction.**

(*r*) "Fraud-avoids all judicial acts, ecclesiastical or temporal" observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a judgment or decree obtained by practising fraud on the court is a nullity and *non est* in the eyes of law. Such a judgment/decree— by the first Court or the highest Court—has to be treated as nullity by every Court, whether superior or inferior. It can be challenged in any Court even in collateral proceedings (*S.P. Chengalvaraya Naidu* v. *Jagannath*, A 1994 SC 853). A court has jurisdiction to set aside a decree obtained by fraud and the defendant can bring a suit for the purpose, though if the fraud was committed on the court, the court can set aside the decree even under section 151, C.P.C. without a regular suit (*Sreemati Savitri* v. *Savi*, 6 Pat 108; *Akhil Kumar* v. *Board of Revenue*, 1995 ALJ 118). (See however, *Sadashiva* v. *Mahadeo*, 118 IC 61, A 1929 Nag 111; *Keshav* v. *Subha*, A 1939 Bom 490, where it has been held that a decree passed in terms of award or by consent cannot be set aside under section 151 on the ground of fraud).

The plaintiff must show how, when, where and in what way the fraud was committed. "The fraud must be actual positive fraud, a mediated and intentional contrivance to keep the parties and the court in ignorance of facts of the case and

plaintiff was not found at Talra, the defendant made an application, supported by an affidavit, alleging that the plaintiff was intentionally evading service, and praying for substituted service, and he obtained an order for service on the plaintiff by publication in "The Statesman," Calcutta.

The said statement of the defendant that the plaintiff was a resident of Talra and that he was evading service were false, were known by the

obtaining the decree by that contrivance" (*Mohomed Hashim* v. *Iffat Ara*, 74 CLJ 261). Mere general allegation of fraud are not sufficient nor proof of constructive fraud or suspicion (*Laxmi Narain* v. *Mohd. Shafi*, A 1949 East Punjab 141). Fraud like any charge of a criminal offence must be established beyond reasonable doubt. Finding of fraud cannot be based on conjecture or suspicion (*Kishan Das Ram Kumar* v. *Shravan Kumar*, 1975 PLJ 556; *Savithramma* v. *H. Gurappa Reddy*, A 1996 Kant 99 Para 8). If fraud is practised on the court or the other party, decree cannot be set aside on the suit of a third person who was no party to it, on the ground that the decree holder had practised fraud upon the latter (*Bishamber* v. *Nilamber*, 125 IC 861, A 1930 Cal 263, 33 CWN 997). *Exparte* decrees, consent decrees and decrees obtained after contest are all liable to be attacked for fraud, the character of which will vary with the circumstance of each case (*Nanda Kumar* v. *Ram Jiban*, 41 C 990, 18 CWN 681, 19 CLJ 457, 23 IC 33). A consent decree may be set aside not on ground of fraud but even on grounds of undue influence, etc., on which a less formal agreement may be set aside (*Rama* v. *Manikkam*, A 1935 Mad 726; *Sital* v. *Parbhu*, 10 All 535). The plaintiff may show that he was prevented by the fraud practised by the defendant from appearing and contesting the claim, or that his consent to compromise was obtained by fraudulent misrepresentation. It is not sufficient merely to allege that the summons was not served on the plaintiff (*Sekharan* v. *Krishnan*, 28 Travancore LJ 184), but it must be alleged and proved that the defendant was responsible for suppressing the service or for having false return of service made (*Jawahir* v. *Neki Ram*, 13 ALJ 190; *Mahadeb* v. *Mahabir*, A 1923 Cal 569 DB; 76 IC 767; *Narana* v. *Kojiram*, 1939 MLR 113); or was, by any fraud, kept back from coming forward and defending the suit. The contrivance should be clearly alleged as particulars of fraud. If, however, the defendant was aware of the suit and could, if he chose, come and defend it, he cannot have the decree set aside on the allegation that the plaintiff practised fraud by making false allegation of title and producing false evidence (*Baikuntha Chandra* v. *Prahlad*, A 1926 Cal 426, 88 IC 52 DB; *Mohammed Yusif* v. *Nurjan*, 104 IC 805 Sind; *Kadirvelu* v. *Kappuswami*, 41 M 743, 34 MLJ 590, 23 MLT 372, 1918 MWN 514, 45 IC 774; *Badri Narain* v. *Parsoti*, 170 IC 146, A 1937 Pat 384; *Konda* v. *Palaniswami*, (1941) 2 MLJ 640). But the court can go into the question whether a claim was false in order to determine whether the plaintiff really suppressed the service of summons on the defendant to obtain a decree on a false claim (*Ram Chandra* v. *Prahlad*, 101 IC 708, 8 PLT 193; *Jagdeo Prasad* v. *Bhagwan Hajam*, 161 IC 474, A 1936 Pat 135; *Kunja Bihari* v. *Krishandhone*, A 1940 Cal 489).

defendant to be false and were made fraudulently to prevent the plaintiff from being informed of the suit, and the plaintiff was thus kept ignorant of the institution of the suit. The plaintiff is a resident of village Sambalhera and has always been living there.

One who seeks to impugn a decree passed after contest takes on himself a much heavier burden and it is not discharged by merely showing that the decision in the former suit was erroneous (*Nanda Kumar* v. *Ram Jiban*, 41 C 190, 23 IC 33). A decree cannot, therefore, be set aside merely because it was obtained on false and perjured evidence (*Kasiwar* v. *Amruddin*, 47 IC 14, 23 CWN 133; *Janki* v. *Lachmi*, 13 ALJ 753; *Kumar Swami* v. *Kamalchi*, 23 MLJ 187, 16 IC 843; *Sher Bahadur* v. *Md. Amin*, 116 IC 330, A 1929 Lah 569 DB), or that a false statement was made in the written statement by the defendant knowing it to be false, as the fraud must be extrinsic to the proceedings in the court (*Ramnathan* v. *Palaniappa*, 180 IC 286, A 1939 Mad 146). But where there has been a wilful suppression of evidence and the evidence withheld is of such a character that, if it had been produced, the probabilities are that the court would have come to a different conclusion, a suit will lie to set aside the decree. **But the plaintiff should in such a suit give full particulars of the evidence withheld and how it would have produced a different result to the litigation** (*Bhikaji* v. *Balvant*, 105 IC 296, 29 BLR 1046, A 1927 Bom 510 DB). If a plaintiff can show that the defendant prevented him by any contrivance from placing before the court in the former suit any material, relevant to the issue, or if any subsequent discovery of evidence shows that, there was any fraud, or that the court was misled in the former suit, the decree obtained even after contest can be set aside (*Abdul Karim* v. *Laiq Ram*, 173 IC 954, A 1937 Rang 534). Where a lady was kept in the dark about proceeding before an arbitrator and when steps were taken to have the award filed, her pleader without her knowledge, confessed judgment, it was held that fraud had been practised (*Umrao Begum* v. *Rahmat Ilahi*, 186 IC 77, A 1939 Lah 439). Merely giving wrong address for service which result in no service is not a fraud (*Tarunanga Nath* v. *Prem Narain*, A 1933 Cal 274, 143 IC 710, 60 C 98).

A decree cannot be set aside on the ground of mistake of fact or law (*Municipal Committee, Amritsar* v. *Harnam*, 9 Lah 35; *Allahbux* v. *Nusserwanji & Co.*, 164 IC 43, A 1936 Sind 99) or, on the ground that it was based on wrong principles (*Madivalapa* v. *Subappa*, A 1937 Bom 458). But a suit to set aside a decree obtained by fraud, practised by the plaintiff himself or both by the plaintiff and the defendant, is not maintainable (*Shripal Gonda* v. *Govind Gonda*, A 1941 Bom 77, 193 IC 795; *Godappa* v. *Balaji*, 196 IC 90, A 1941 Bom 274; *Md. Fazal Khan* v. *Abdul Rahim Khan*, 1950 NLJ 226).

A suit to set aside a decree on the ground of fraud may be instituted in any court in which a part of the fraud was committed, e.g., in a court which served the summons, when the fraud was committed in connection with the service, or where the decree is executed (*Jawahir* v. *Neki Ram*, 13 ALJ 190). There is no objection to

3. The plaintiff came to know of the fraud alleged in para. 2 above on March 10, 1995, when on receipt of a notice of execution he inspected the record of the original case.

The plaintiff claims that the said decree be set aside.

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an inferior court entertaining a suit for setting aside, on this ground, a decree passed by a superior courts (*Pilla* v. *Vedola*, 24 MLJ 254, 51 IC 536; *Chandi Prasad* v. *Govind*, 39 IC 791, 1 PLW 499).

When a defendant applied under O.9, R.13, for setting aside a decree because he was kept away from appearing on account of the fraud of the plaintiff, but did not deposit security as required by the Provincial Small Cause Courts Act, his application was dismissed, and it was held that he could bring a regular suit on the same grounds (*M.A Maistry* v. *Abdul Azizz*, 104 IC 313, 5 R 471, 6 Bur LJ 148). But when a Small Cause Court had made an adjudication on merits, a regular suit was held barred (*Musthana* v. *Mohendra*, 76 IC 794, 1 R 500, A 1924 Rang 119).

Limitation : For such suit is three years from the date when fraud becomes known to the plaintiff (Article 59). The plaintiff should, therefore, mention the date of his knowledge in the plaint. If the defendant pleads limitation he must show plaintiff's knowledge anterior to that date (*Rahimbhoy* v. *Turner*, 17 B 341 PC).

Relief: claimed should be specifically for setting aside the decree. A declaration that the decree is not binding cannot be granted as the decree obtained by fraud is merely voidable and not void (as in the case of a decree passed without jurisdiction) and is perfectly binding until set aside (*Haji Munshi Fuzlu-Uddin* v. *Khetra Ghorai*, 30 CWN 59, A 1926 Cal 167 DB; *Pevandbai* v. *Thaoomal*, A 1926 Sindh 15, 88 IC 744; *Rajbans* v. *Askaran*, A 1930 Pat 227, 125 IC 113), nor can suit be maintained for declaration that proceedings in execution of a decree are null and void (*Amar Singh* v. *Chhajjumal*, 108 IC 55 Lah). Where the decree is against several persons including the plaintiff and is for a declaration that a certain *wakfnama* is invalid, the plaintiff might sue for a declaration that the decree is nullity so far as he is concerned and is not binding upon him. It has been held in *Rajib Pande* v. *Lakhan*, 27 C 11; *Bholanath* v. *Mt. Nagendra Bala*, 110 IC 571, A 1928 Cal 810 DB, and *Jamiraddin* v. *Khadejanesso*, 114 IC 407, A 1929 Cal 685; *Jatindranath Das* v. *Judaram*, 79 CWN 936; *Asharfi Lal* v. *Koili*, A 1995 SC 1440, that party against whom a decree is set up can show, without having to bring a fresh suit, that the decree was obtained by fraud. The aid of section 44, Evidence Act was taken in these cases.

The consequence of the setting aside of a decree on the ground of fraud depends on the finding in the suit for setting aside the decree. If the whole proceedings are set aside as fraudulent, that is the end of the matter and the earlier suit cannot be continued. If, on the other hand, the decree has been set aside on the ground of suppression of summons by means of fraud the first suit is revived and the plaintiff of that suit is entitled to have it tried and disposed of according to law (*Nizan Singh* v. *Kishuri Singh*, A 1931 Pat 204 FB; *Jagrup* v. *Ram Sabad*, A 1942

No. 193—Suit for Setting Aside a Transfer made to Defeat Creditors *(s)*

1. The plaintiff No.1 has decree No. 515 of 1994, passed by the Civil Judge at Varanasi, for Rs.2,908 against defendant No.1 and the plaintiff No.2 has debt of Rs.2,600 and interest owing to him under a bond of August 4, 1993, from the said defendant No.1.

[*If there are other creditors also, add*—several other persons whose names and addresses so far as known to the plaintiffs are given in the schedule attached herto (*or*, whose names are not known to the plaintiffs) (*or*, several other persons, the names and addresses of some of whom are mentioned in the schedule attached hereto and the name of others are unknown to the plaintiffs) have also debts owing to the them from the said defendant No.1].

2. The plaintiffs bring the suit on behalf of all the creditors of defendant No.1.

3. With the intention of defeating the aforesaid claims of the plaintiffs (*or*, the plaintiffs and the other creditors aforesaid) the defendant No.1 has fraudulently transferred the whole of his immovable property, detailed below, by a deed of gift dated May 18, 1995, in favour of his sister's son, defendant No.2

4. The plaintiffs came to know of the said gift on July 20, 1995, when a notice of mutation was published in the village.

Oudh 217; *Bisesar Pathak* v. *Phaguni Mahton*, A 1948 Pat 33).

Defence in such cases usually is a denial of the alleged facts or of their sufficiency to amount to fraud. Since *res judicata* is outside the region of fraud it cannot be pleaded that the suit is barred by the principles of *res judicata* u/s 11 of C.P.C.

(s) Such a suit cannot be brought by the transferor himself after the fraudulent purpose has been carried out (*Mangal* v. *Bakhtawar*, 135 IC 244; *Kisan Ram* v. *Godawari*, A 1940 Pat 389, 189 IC 489; *Nagabhusan* v. *Seethama*, 18 Mys LJ 409; *Kalipada Mondal* v. *Kali Charan Mondal*, A 1949 Cal 204). Under section 53 Transfer of Property Act, such a suit can be instituted only on behalf of, or for the benefit of, all the creditors. Therefore, though one creditor may sue and though he is the sole and only creditor, yet he must do so for the benefit of all and should make this clear in his relief (*Deokali* v. *Ramdevi*, A 1941 Rang 76, 193 IC 286) **The plaintiffs must allege their claims, the defendant's transfer, and the fact that it was made fraudulently with an intent to defeat or delay the claims.** *It must also be clearly*

The plaintiffs' claim that the said transfer be declared null and void against the creditors of the said defendant No.1.

No. 194—Ditto, with Alternative Claim for a Declaration that the Transfer is Sham

1. The plaintiff got attached the house described below in execution of his decree No.515 of 1994 of the Civil Judge's Court, Varanasi, against defendant No.2.

(Description of the house)

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alleged that the suit is brought on behalf of, and for the benefit of all the creditors, otherwise the suit will not be maintainable under section 53, Transfer of Property Act (*Faquir Bux* v. *Thakur Prasad*, A 1941 Oudh 457, 194 IC 588). If all creditors are not joined, permission must be obtained under O.1, R. 8, for bringing a representative suit. If no such permission is obtained, the suit will not be representative in spite of an allegation in the plaint to that effect and the decision will be binding only on the actual parties to the suit even if it is not dismissed on the ground of non-maintainability (*Mt. Banto* v. *Firm R.S. Lala Shiva Prasad*, A 1943 Lah 96) but if all the creditors are parties to the suit no permission to sue under O.1, R.8, is necessary (*Jaina* v. *Official Receiver*, A 1946 Mad 25). If a suit is filed by the plaintiff in the belief that he is the only creditor, even the Appellate Court can give him permission to sue in a representative capacity (*Mandavil* v. *Krishna*, A 1947 Mad 194, (1946) 2 MLJ 432, 1947 MWN 732).

It is not necessary that the creditor should be a judgment creditor, but any one who has a claim for which the transferor is legally liable can sue, e.g., a Hindu wife who has been deserted by her husband has a legal claim for maintenance and is a creditor (*Meenakshi* v. *Ammani*, 101 IC 610 Mad). Even a future creditor can sue on the allegation that the transfer was made on the eve of borrowing money from him in order to defraud him, though in that case the onus on him will be a heavy one (*Muhammad Ishaq* v. *Md. Yusuf*, 8 Lah 544). But an auction purchaser in execution of a decree of the creditor cannot sue except when he is the decree holder himself (*Ram Ratan* v. *Akhatii*, 181 IC 181, A 1939 Oudh 230; *Lalit Mohan* v. *Anil Kumar*, 43 CWN 1136; *Bai Hakimbu* v. *Dayabhi*, A 1939 Bom 508, 185 IC 655). Preferring one creditor to another is not an act of fraud and a transfer made with that object cannot be set aside (*Ma Pwa* v. *S.R.M.M.A. Chettiar*, 561 A 379, 7 R 624, 34 CWN 6, A 1929 PC 279; *Bai Hakimbu* v. *Dayabhai*, A 1939 Bom 508; *Bulaqi* v. *Jaswant*, 42 PLR 385; *Musahar Sahu* v. *Hakim Lal*, 14 ALJ 198 PC; *Mina Kumari* v. *Bijoz Singh*, 15 ALJ 382 PC; *Kishan Das Ram Kumar* v. *Shravan Kumar*, 1975 MPLJ 556). Where the sale consideration is inadequate, and the sale deed was executed only nominally for a collateral purpose and with a view to stave off creditors with the express understanding that the properties sold would be reconveyed to the vendors after

2. Defendant No.1, who is the wife of defendant No.2, claimed the said house under a sale-deed, dated May 15, 1992, executed by defendant No.2 and her claim has been allowed and the house released from attachment.

3. The said sale-deed is a sham and bogus transaction and does not convey any title to defendant No.1.

4. Alternatively, the said sale was made by defendant No.2, fraudulently with the intention to defeat or delay the claims of the plaintiff under the aforesaid decree.

The plaintiff claims a declaration that the said sale-deed is a sham and bogus transaction, or that it is null and void against the plaintiff, and therefore the said house is liable to attachment and sale in execution of the plaintiff's aforesaid decree.

No. 195—Suit for Procuring Property by Fraud

(Form No. 21, Appendix A, C.P.C.)

1. On the ___ day of _____ 19___, the defendant for the purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he, the defendant, was solvent and worth _____ rupees over all his liabilities].

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the pressure of the creditors had subdued, it was held that the sale was vitiated. It was also held that vendee was not entitled to any equities in such cases (*Prasad* v. *Govindaswami Mudaliar*, A 1982 SC 84).

The facts proving the transaction to be fraudulent need not be detailed in the plaint, but must be reserved for the trial. If the transaction was a sham and colourable one and not intended to take effect as a transfer, a suit need not be brought under section 53 Transfer of Property Act, but the creditor may follow the property (*Bibi Sirab* v. *Mt. Golab Kuer*, 53 IC 892, A 1929 Pat 409; *Palaniandi* v. *Appavu*, 30 MLJ 565, 34 IC 778; *Prabhu* v. *Sarju*, A 1940 All 407, 190 IC 337). In fact in such cases a suit can not be brought under section 53 Transfer of Property Act (*G.B. Subrayalu* v. *A Rao*, A 1945 Mad 281). He may bring an alternative suit for declaration that the transaction is a sham or for having it set aside under section 53 Transfer of Property Act. It was held in some cases that the frame of a suit seeking to set aside a transfer on the ground of being collusive and fictitious was defective (*Prabhu* v. *Sarju*, A 1940 All 407; *Mt. Rukaiya* v. *Radha Dishan*, A 1944 All 214). This seems to be too technical a view and in a subsequent case Kerala High Court rejected such an attack (*Onseph Skaria* v. *Cherian Joseph*, A 1965 Ker 288).

Limitation is 3 years under Article 113. The starting point of limitation is the date on which the plaintiff comes to know of the circumstances entitling him to

2. The plaintiff was thereby induced to sell [and deliver] to the defendant sundry goods of the value of _____ rupees.

3. The said representations were false [*state the particulars of falsehood*] and were then known by the defendant to be so.

4. The defendant has not paid for the goods (*or, if the goods were not delivered*, the plaintiff, in preparing and shipping the goods and procuring their restoration, expended ____ rupees).

[*Relief claimed*]

No. 196—Fraudulently Procuring Credit to be given to another Person

(Form No. 22, Appendix A,C.P.C.)

1. On the __ day of _____19__, the defendant represented to the plaintiff that *EF* was solvent and in good credit, and worth ____ rupees over all his liabilities [*or*, that *EF* then held a responsible situation and was in good circumstances, and might safely be trusted with goods on credit].

2. The plaintiff was thereby induced to sell to *EF* [rice] of the value ____ rupees [on ____ month's credit].

3. The said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff (*or*, to deceive and injure the plaintiff).

4. *EF* [did not pay for the said goods at the expiration of the credit aforesaid *or*,] has not paid for the said rice, and the plaintiff has wholly lost the same.

[*Relief claimed*]

No. 197—Suit against a Fraudulent Purchaser and his Transferee with Notice

(Form No. 33, Appendix A,C.P.C.)

1. On the ____ day of _____19___, the defendant *CD* for the

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have the transfer avoided. It is necessary to allege the date of knowledge of the plaintiff.

Defence : The defendant transferee may show that he has taken the property for consideration in good faith, or that he was also a creditor and has taken in lieu

purpose of inducing the plaintiff to sell him certain goods, represented to the plaintiff that [he was solvent, and worth ____ rupees over all his liabilities].

2. The plaintiff was thereby induced to sell and deliver to *CD* [one hundred boxes of tea], the estimated value of which is ____ rupees.

3. The said representations were false, and were then known by *CD* to be so [*or*, at the time of making the said representations, *CD* was insolvent, and knew himself to be so].

4. *CD* afterwards transferred the said goods to the defendant *EF* without consideration [*or*, who had notice of the falsity of the representation].

The plaintiff claims :

(1) Delivery of the said goods, or ____ rupees, in case delivery cannot be had;

(2) ____ rupees compensation for the detention thereof.

[*For other precedents of fraud, see "Cancellation of Instrument" ante*].

INJUNCTION *(t)*

No. 198—Suit for Damages for Wrongfully Obtaining Temporary Injunction

1. On March 20, 1994, the defendant instituted a civil suit No.12 of 1994 in this court against the plaintiff for recovery of possession on certain land, on which the plaintiff was constructing a house.

2. On the same date, the defendant applied for and obtained a temporary injunction restraining the plaintiff from making any further construction until the disposal of the said civil suit. The said injunction was served upon the plaintiff on March 22, 1994.

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of his debts. If the creditor once accepts a gift, e.g., impleading the donee in his suit under section 128, Transfer of Property Act, he cannot afterwards impeach the gift under section 53 (*Sachitanand* v. *Radhapat*, 26 ALJ 524 DB).

(t) Forms of suits for "injunction" will be found under "Easements," "Nuisance" and "Injunction". See note *(e)* which applies *mutatis mutandis* to these cases also. The right of such suits is recognised in *Bhutnath* v. *Chandra Benode*, 16 IC 433, 16 CLJ 34; *Har Kumar* v. *Jagat Bandhu*, 100 IC 318, 53 C 1008, A 1927 Cal 247 DB; and *Rama Rao* v. *Somasundaram*, 51 M 642. It is not enough to

3. The defendant's said civil suit was dismissed on December 12, 1995.

4. The said temporary injunction was applied for maliciously and without any reasonable or probable cause.

5. The plaintiff has thereby suffered damage.

Particulars

(i) The plaintiff had erected walls of three rooms to the height of 8 feet before the injunction was served upon him, and they all fell down during the rains. The labour and time were therefore wasted and the bricks were also damaged. It would now cost Rs.12,000 to erect the walls to the same height, after utilizing serviceable bricks of the former wall.

(ii) The plaintiff was building the house for letting it on rent and the plaintiff has lost the rent of 9 months and 21 days at Rs.200 p.m amounting to Rs.1950.

The plaintiff claims Rs.13,940 with interest from date of suit to that of payment.

LEGAL REPRESENTATIVE *(u)*

No. 199— Suit by the Executor or Administrator of a Deceased Person

[*Before setting out the facts constituting the cause of action for the suit, add*]:

"1. The plaintiff is the executor of ..... deceased."

or

show that injunction was applied for on insufficient grounds, it must also be proved that there was no reasonable and probable cause for applying for it and that the defendant was actuated by malice (*Bhupendra* v. *Trinayani*, A 1944 Cal 289; also see *Ram Pratap* v. *Narain Singh*, A 1965 All 172). Abuse of process of law is the crucial element of this tort, and if that is established no further proof of malice is necessary (*Filmistan Ltd.* v. *Hansaben*, A 1986 Guj 35 DB).

Limitation for such a suit is three years from the date when the injunction ceases (Article 90).

(u) The English law maxim that a personal action dies with the person has been modified by *Philips* v. *Homfrey*, (1883) 24 Ch D 439, to this extent that a suit for damages for a wrongful act is allowed to be brought or continued against the estate of the deceased wrongdoer when the property or the proceeds or value of property

"2. The plaintiff is the son and legal heir of.....deceased, who died intestate, and has obtained letter of administration of the estate of the said .....from the court of.....in Miscellaneous/Test, case No.....of....."

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belonging to another have been appropriated by the deceased person and added to his own estate or moneys. This has been recognised in India also. For example, a suit for damages for trespass on plaintiff's colliery lies against the legal representative of the trespasser (*Pannalal* v. *Adjai Coal Co.*, 101 IC 62, 31 CWN 82, A 1927 Mad 117). The maxin has further been modified in India by the provision of Act XII of 1855 (Legal Representatives Act), section 306, Indian Succession Act and section 89, Probate and Administration Act. Under the provisions of the Succession Act and the Probate and Administration Act, all demands whatsoever, and all rights to prosecute or defend any suit existing in favour of, or against, a person at the time of his death, survive to, or against, his executors or administrators, except causes of action for personal injuries not causing death and except cases where, after the death of the party, the relief sought could not be enjoyed or granting it would be nugatory. The deceased plaintiff checked into and stayed at Hotel Oberoi Intercontinental. He visited the hotel swimming pool and while diving got head injury and was incapacitated. He died after 12 years. The maxim '*res ispa loquitur*' applied and compensation awarded. It was also held that the cause of action survived and the heirs of the deceased were entitled to recover the compensation (*Klaus Mittelbachert* v. *East India Hotels*, A 1997 Del 201).

The words "personal injuries" are not confined to physical injuries but wrongs such as defamation, malicious prosecution, etc., are also included (*Punjab Singh* v. *Ram Autor* 52 IC 348, 4 PLJ 676; *Rustomji* v. *Nurse*, 44 M 357; *Motilal* v. *Hari Narayan*, 47 B 716). It should be noted that **under these Acts, cause of action does not survive to an ordinary heir or legal representative but only to an "executor" or "administrator"**. Even if the cause of action does not survive in any case, Act XII of 1855 will permit a suit to be brought by the legal representative of any person for a wrong committed in the latter's lifetime which has occasioned pecuniary loss to his estate, and similarly a suit can be brought under that Act against the legal representative of wrong-doer for any wrong for which the latter could have been sued. In the latter case, it is not necessary that the tort should have caused any pecuniary gain to the wrong-doer or loss to the other person. In both cases, the important condition is that the **wrong should have been committed within one year of the death** of the deceased person.

The result may be summarized as below :

If the person wronged dies —

(1) His legal representative cannot bring a suit in respect of a personal injury, except when it causes pecuniary loss to his estate (in which case a suit lies under Legal Representatives Act XII of 1855), or when it causes death (in which case a suit lies under Fatal Accidents Act XIII of 1855).

No. 200—Suit by any Other Legal Representatives under Act XII of 1855

[*After setting out the facts constituting the cause of action for the suit, add*] :

1. The said wrongful act of the defendant has caused the following pecuniary loss to the estate of the said.....

(*Specify the injury*).

2. The said.....died on.....

3. The plaintiff is the brother and legal heir and representative of the said.....

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(2) In respect of any other tort, his executor or administrator may sue within the ordinary period of limitation.

(3) Any other legal representative can sue only under Act XII of 1855, if the tort has caused pecuniary loss to the estate.

(4) A suit under Act XII of 1855, must be brought within one year of his death, and cannot be brought unless the tort was committed within one year of his death.

(5) If the suit by an ordinary heir does not come within Act XII of 1855, he should obtain letters of administration to be entitled to sue under the Probate and Administration Act or Succession Act.

If the wrong-doer dies —

(1) If the tort was a personal injury, a suit can be brought against his legal representative only under Act XII of 1855, i.e., within two years of his death and only when the tort was committed within one year of his death.

(2) If it was any other tort, a suit can be brought against his executor or administrator within the ordinary period of limitation.

(3) If the wrong-doer has appropriated the property or proceeds or value of property of another, the latter can recover damages from his estate in the hands of legal representative.

Full facts showing how the suit is maintainable should therefore be alleged in every suit for tort by or against a legal representative.

Substitution : Act XII, applies to suits *commenced* by or against a legal representative and does not permit a suit instituted during the lifetime of a person to be continued by or against his legal representative (*Ramchandra* v. *Rockmany*, 28 M 487; *Har Das* v. *Ram Das*, 13 B 677; *Krishna* v. *The Corporation of Calcutta*, 31 C 406). The continuance of such a suit depends on whether the cause of action survives or not according to Succession Act or Probate and Administration Act. Suit filed against a doctor for damages for negligently performing an operation cannot be continued against his legal representative as the doctor's death

No. 201—Suit against the Executor or Administrator of a Tort-feasor

[*After setting out the facts constituting the cause of action, add*] :

1. The defendant is the .....of the said.....deceased.

No. 202—Suit against a Legal Representative under Act XII of 1855

[*After setting out the facts constituting the cause of action for the suit, add*] :

1. The said.....died on.....

2. The defendant is the .....of the said.....deceased.

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extinguishes his liability in tort and the right to sue also gets extinguished (*C. Jayprakash* v. *State of A.P.*, A 1977 AP 20).

Suits under, Fatal Accidents Act XIII of 1855

If the death of a person is caused by wrongful act, a neglect or default of the defendant under such circumstances that, if the said act had only resulted in personal injury, short of death, the deceased could have brought a suit for damages, the executor, administrator or representative of the deceased can bring a suit for damages under the Fatal Accidents Act XIII of 1855. Such a suit can be instituted only for the benefit of the wife, husband, parents meaning father, mother, grandfather or grandmother and child meaning son, daughter, grandson, grand-daughter, stepson or stepdaughter, and if the deceased has left no such relations, no suit can be brought. The suit may be brought by all the heirs named above or by any one of them, or by the executor or administrator of the deceased. Only one such suit is permissible, but a claim for injury to the estate of the deceased in the same transaction may be added (section 2).

Particulars of the persons for whose benefit the suit is brought should be given in the plaint (section 3), **as also particulars of the wrongful act, neglect or default of the defendant, which caused the death, and also of the damages claimed.** However, for mere omission of the name of one beneficiary the suit cannot be dismissed at appellate stage (*Jeet Kumari* v. *Chittagong E. & E. Supply Co.*, A 1947 Cal 195, 51 CWN 419, 82 CLJ 68). Damages can be claimed under two heads: under section 1, damages proportionate to the loss resulting from death to the claimants, and under section 2 damages for pecuniary loss to the estate of the deceased resulting from the wrongful act which caused the death (*Jeet Kumari* v. *Chittagong E.&E. Supply Co.* A 1947 Cal 195, 51 CWN 419; *Shankarrao Prahladrao* v. *Babulal Fauzdar*, 1980 MPLJ 563). If the plaintiffs have received any compensation out of fine imposed by criminal court, the same should be taken into consideration in fixing the amount (*Nathuram* v. *Chand Kr.*, 106 IC 165 All).

No. 203—Suit Under Act XIII of 1855 (Fatal Accidents Act)

1. The plaintiff No.1 is the widow, and plaintiffs 2-4 are and were on December 21, 1995, the minor children of one Sukh Din deceased (*or*, the plaintiff is the widow of Sukh Din deceased and brings this suit for her own benefit and for the benefit of the minor children of the said Sukh Din, who died on December 21, 1995).

2. The said Sukh Din was killed, his cart was smashed and his two bullocks were killed, by injuries caused by the negligence of the defendant's servants on December 21, 1995 at the Hindoria level crossing near Damoh station where the public cart-road from .....to.....crosses the defendant's line of railway.

3. The negligence consisted of the defendant's servants leaving the gates at the said level crossing open and thereby inviting the said Sukh Din to cross the line at a time when a special goods train was approaching from Damoh side. In consequence the said Sukh Din who was proceeding to cross the line with his cart and bullocks was run over by the said train and was instantaneously killed, and his bullocks were also killed and his cart was smashed.

For the prospective loss of income or other earnings, the court should have regard to various factors such as, what sum, if invested, would produce the amount of income which he would probably have spent on the plaintiffs, the accidents of life and other matters, and give the plaintiff what is considered under all the circumstances as a fair compensation for the loss. The possibility of the deceased's death, his age and earning capacities are factors all of which are to be taken into consideration in assessing the amount of damages (*Dhansingh* v. *Ganeshibai*, 101 IC 642 Lah). Sympathetic damages or solatium for loss of companionship, etc., are not relevant. What is to be considered is the loss of reasonably expected benefit (*Jeet Kumari* v. *Chittagong* v. *E.&E. Supply Co.*, A 1947 Cal 195). The principles on which the amount to be awarded as damages is to be assessed have been discussed in *Governor General in Council* v. *Bhanwari Devi*, A 1961 All 14; *State Mysore* v.*Gowri Vithal Deshbhadari*, A 1964 Mys 113; *Union of India* v. *V.S. Ghosh*, A 1973 Pat 129; *Manoharlal Shobharam Gupta* v. *M.P. Electricity Board*, 1975 MPLJ 744; *Shriram Hari Tambeg* v. *Diwakar Ramchander Kharbe*, A 1975 Bom 227; *Vasanty G. Kamath* v. *Kerala State Road Transport Corporation*, 1981 KLT 200; *Patel Hirabhai Changanlal* v. *Gujarat State Road Transport Corportiaon, Gita Mandir*, A 1981 Guj 226; *K.S.E.S.* v. *Kamalakshy Amma*, A 1987 Karn 253 DB). [See also notes and precedents on compensation claim application under Motor Vehicle Act under "Miscellaneous Applications" *post*].

4. The said Sukh Din was earning Rs.2,000 per month by plying his cart and was a healthy man of 32 years and was the sole support of the plaintiffs (*or*, of the plaintiff and her minor children), and the plaintiffs (*or*, the plaintiff and her minor children) have suffered damage by his death and by the death of his bullocks and damage to his cart. Out of the income of Rs.2,000 Sukh Din used to contribute more than Rs.1,500 per month to the maintenance of the plaintiffs [*or*, of the plaintiff and her minor children).

Particulars of Damage

	Rs.
Loss at Rs.1,500 per mensem for 28 years, the expected period of the life of the said Sukh Din ...	5,04,000
value of the two bullocks	14,000
Value of the cart	11,800

Particulars of the persons for whose benefit the suit is brought

1. Smt. Baribahu, widow, aged 30.
2. Ram, son, aged 10.
3. Km. Ganga, daughter, aged 7.
4. Km. Jamna, daughter, aged 3.

The plaintiffs (*or*, the plaintiff) claim(s) Rs.5,29,800 with interest from date of suit to that of payment.

LIBEL *(v)*

No. 204—Suit for Libel

1. The defendants Nos.1, 2 and 3 are editor, printer and publisher

Limitation : There is a special period of limitation governing suits under Act XII of 1855. A suit by the legal representative of the deceased should be brought within one year (Article 81) and a suit *against* him can be brought within two years, of the death of the deceased (Article 83). In all suits brought under this Act, therefore, the date of death should be clearly alleged. But a suit to which Act XII does not apply i.e., when the cause of action survives, it is governed by the ordinary rule of limitation (*Chundermonee* v. *Bantomonee*, 1 WR 251). Limitation for suit under Act XIII of 1855 is two years (Article 82).

Defence: Same as could be raised if the deceased had received personal injuries short of death and had brought a suit for damages.

(v) Libel consists of the publication by the defendant by means of printing,

respectively of the "Meerut Herald", an English weekly newspaper which has a large circulation in the Meerut division.

2. The plaintiff is employed as Executive Officer of the Bulandshahr Municipality in the Meerut division, and has many friends and relations, residing in the said division.

3. In the issue of the said paper of February 4, 1996, the defendants falsely and maliciously, printed and published of the plaintiff, and of him by way of his profession, the following words in an editorial article : "He has no educational qualification, and is totally unfit for the post of an Executive Officer of a big Municipality like Bulandshahr. He was formerly employed in the Municipal Board of Azamgarh and was dismissed by that Board for dishonest misappropriation of the Board's money"

4. By the said words the defendant meant, and was understood to mean, that the plaintiff was incompetent and useless as an Executive Officer and further that he was a dishonest person who had committed a criminal offence or criminal offences while in the service of the Municipal Board of Azamgarh.

5. By reason of the premises, the plaintiff has been greatly injured in his credit and reputation and has been brought into public odium and contempt and has suffered much pain and humiliation.

The plaintiff claims Rs. 10,000 as damages.

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writing, picture, signs etc., of any matter defamatory of the plaintiff (see also, Slander. *post*). **The following points must be alleged in the plaint :**

(1) The exact words which are said to be defamatory, or a description of the painting or signs claimed to be defamatory with their latent significance (*Purushottam Lal Sayal* v. *Prem Shankar*, A 1966 All 377).

(2) If the words are, with reference to the context, such as are capable of conveying a more serious imputation than they ordinarily carry, such imputation may be alleged. If the words are plain and not defamatory in themselves, but were used by the defendant in a particular sense and have a latent meaning which is defamatory such meaning of those words must be set out in the plaint. The explanation is technically called an "*innuendo*". But the words from which an "*innuendo*" is to be extracted must be fairly susceptible of the meaning sought to be given and where they are susceptible of serveral meanings, it is unreasonable to seize upon the bad meaning (*Hales* v. *Smiles*, 168 IC 853, A 1937 Rang 105; *Ramkant* v. *Devi lal Sharma*, 1969 MPLJ 805). The meaning attributed by the plaintiff should be one which can be conveyed to reasonable men and words which bear their ordinary meaning should be shown to have a libellous tendency. It is not sufficient

No. 205—Suit for Libel by Innuendo Published on an Occasion of Qualified Privilege

1. The defendant is the Tahsildar of Tahsil Nakur, Dist. Saharanpur, and the plaintiff is a farmer of village Renkra in Tahsil Nakur, who had taken a loan from the government for purchase of a tractor.

2. The collector called for a report from the defendant of all the persons who are habitual defaulters of dues recoverable as arrears of revenue in the defendant's said Tahsil.

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to show that they were understood by some persons in that sense (*Union Benefit Guarantee Co.* v. *ThakarLal*, 161 IC 769, A 1936 Bom 114).

(3) That the defamatory statement was in writing or in printing or was conveyed in the form of painting or caricature.

(4) That it referred to the plaintiff (*Manmohan* v. *Yash*, A 1964 SC 1161).

(5) That it was published [*with particulars of such publication, the names of persons by whom and when and how it was published (Brijlal* v. *Mahant Lal Das*, A 1940 Cal 393; *Nannumal* v. *Ram Pd.*, A 1926 All 672, 96 IC 89; *Subbarayudu* v. *Ramakrishna Rao*, (1968) 2 Andh LT 101)]. In case of newspapers, it is not necessary to allege names of the persons who read the paper. Communication made in the ordinary course of business to a typist has been held not to amount to a publication (*Kishab Lal* v. *Pravat Chandra*, A 1938 Cal 667).

(6) If the occasion of publication was one of a qualified privilege, e.g., when it was published in an official report, malice of the defendant must be alleged to show that he cannot take advantage of the privilege.

(7) No special damage is necessary in such case, though if any has been suffered, it can be claimed. But when in the case of libel on a company, the words complained of refer only to the personal character of its officers and do not reflect on the company in the way of its property, the company cannot succeed unless it proves special damage to it (*Union Benefit Guarantee Co.* v. *Thakarlal*, 161 IC 769, A 1936 Bom 114).

In a libel action when the defendant raises plea of justification and mentions evidence by which he might substantiate his case, the court should not grant temporary injunction restraining further publication of the alleged libel (*Abdul Wahab Galadhari* v. *Indian Express Newspapers (Bom). Ltd.*, A 1994 Bom. 69), except where the words have been published in pursuance of a conspiracy having sole or dominant object of injuring plaintiff (*Gulf Oil Ltd.* v. *Page*, (1987) 3 All ER 14 (CA).

It is not necessary to allege falsity of the statement in the plaint. Similarly, malice is not an essential element to support a claim for libel (*Rahim Baksh* v. *Bachalal*, 51 A 509, 27 ALJ 303, 115 IC 458, A 1929 All 214 DB; *Union Benefit Guarantee Co.*, supra; *Indian express Newspaper Ltd.* v. *Jagmohan*, A 1985 Bom

3. The defendant, on September 4, 1995, submitted a written report to the Collector and therein falsely and maliciously wrote and published of the plaintiff the following words : "He is the best paymaster in my Tahsil and is a first class gentleman."

4. By the said words the defendant meant, and was understood to mean, that the plaintiff was worst defaulter in his Tahsil and a thorough rogue.

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229), unless the occasion of publication be one of qualified privilege. But, as it is not proper or safe to depart from established precedent, it is better to make these allegations also in every plaint for libel or slander.

Limitation : For such a suit is one year from the date of publication of the libel (Article 75). The date of publication should therefore be alleged.

Parties : In case where newspapers, editors, printers and publishers are all liable but if suit against one is dismissed, the other cannot be sued as the cause of action is indivisible (*Makhanlal* v. *Punchamlal*, A 1934 Nag 226, 152 IC 398).

Defence : If there is no justification it is always wise to offer an apology, as to plead justification in such cases is to alienate the sympathy of the Judge and to run the risk of a decree for heavy damages. But apology tendered and accepted in criminal court is no defence to a civil suit (*Govind Charyalu* v. *Seshagni*, A 1941 Mad 860). The apology should not appear to be a mere paper apology in a hesitating manner but an unreserved expression of sorrow (*L.D. Jaikwal* v. *State of U.P.*, A 1984 SC 1374, Contempt case). Where justification is pleaded, the defendant must make clear in the particulars of justification, the case which he is seeking to set up and must state clearly the meaning or meanings which he seeks to justify (*Morrel* v. *International Publishing Ltd.*, (1989) 3 All ER 733 (CA); *Lucas Box* v. *News Group Newspapers Ltd.*, (1986) I All ER 177 (CA). He may plead justification of any alternative meaning which those words are reasonably capable of bearing (*Prager* v. *Time Newspaper Ltd.*, (1988) I All ER 300 (CA). An unsuccessful plea of justification might deprive even a successful defendant of his costs (*Makhanlal* v. *Pancham*, A 1934 Nag 226). When plea of justification is entirely given up, evidence relating to justification cannot be reconsidered for the purpose of mitigation of damages (*Rustam* v. *Krishnaraj*, A 1970 Bom 424). The following are the justifications ~~of a libel, any one of which may be a complete defence, though more than one of~~ such pleas may be taken.

(1) *Truth, (Nellikka* v. *Deshabhimani Ltd.*, A 1986 Ker 41) But if the real truth has been exaggerated, the libel will not be justified (*Clarkson* v. *Lawson*, 6 Bing 266). If the charge made in the libel is specific, the defendant may simply plead its truth, but if it is one of general misconduct of the plaintiff, the defendant must, if he wants to justify it as true, give particulars of instances to prove the truth of the statement.

(2) *Fair and bona fide comment* on matters of public interest. If the imputation

5. By reason of the premises, the plaintiff has fallen considerably in the estimation of the District Officer and has suffered much in credit and reputation.

The plaintiff claim Rs. 5,000 as general damages.

is one of conduct amounting to a criminal offence, the defendant will have to prove it with the same conclusiveness as in a criminal prosecution, so that, if there is any doubt, the plaintiff will have the benefit of it (*Khair-ud-din* v. *Tara Singh*, 99 IC 300, 7 Lah 491). A defendant who relies on a plea of fair comment in libel proceedings is not required to show that the comment was an honest expression of his own views, but that the facts on which comment was based were true and that the comment was objectively fair in the sense that any man, however prejudice and obstinate, could honestly have held the view expressed (*Telniknoff* v. *Matusevcth*, (1991) 4 All ER 817 HL). A comment is not fair if it is not honest or relevant, or is not based on true facts and it must express an opinion and should not state a fact (*Union Benefit Guarantee Co.* v. *Thakarlal*, 161 IC 769, A 1936 Bom 114; *Raghunath* v. *Mukandilal*, 165 IC 892, A 1936 All 780; *Radheyshyam* v. *Eknath*, A 1985 Bom 285.) When fair comment is pleaded the defendant is required to spell out with sufficient precision to enable the plaintiff to know the case he had to meet what the comment was which the defendant claimed was fair comment and attracted the comment defence (*Control Risk Ltd.* v *New English Library Ltd.*, (1989) 3 All ER 577 (CA). For instance, that the statement of fact are true and those to opinion constitute fair comment. Such a "rolled up" plea is held to be a plea of fair comment only (*Union Benefit Guarantee Co.* v. *Thakarlal*, 161 IC 769, A 1936 Bom 114).

(3) *Absolute Privilege*, such as that of judicial proceedings including proceeding before any tribunal recognised by law such as a commission of inquiry (*Duraiswami* v. *Lakshman*, A 1933 All 537) or state proceeding or parliamentary proceedings, but not proceeding, before administrative tribunals (*Purushottam Lal* v. *Prem Shanker*, A 1966 All 377). A Judge or a Magistrate is absolutely privileged, even though he acts maliciously, provided he does not knowingly act beyond his jurisdiction. A *vakil* is also similarly privileged (*Jagat Mohan* v. *Kalipado*, 1 Pat 371, A 1922 Pat 104, 669 C 86; *Sullivan* v. *Norton*, 10 M 28); but it has been held in Bombay that advocates are not absolutely privileged and will be liable if malice is definitely proved by plaintiff (*Tulsidas* v. *Bilimoria*, 137 IC 275, A 1932 Bom 490, 34 BLR 910). Statements made by parties or witnesses on oath or in complaints and the statement of an accused person are all privileged (*C.H. Crowdy* v. *L.O'Reilly*, 17 CLJ 105, 18 IC 737; *Nannu Mal* v. *Ram Prasad*, A 1926 All 672 DB), so the statement made in first information report to the police (*Madhab Chandra* v. *Nirod*, A 1939 Cal 477, 43 CWN 775; *Sanjivi Reddi* v. *Koneri Reddy*, A 1926 Mad 521 DB; *V. Narayana Bhat* v. *S. Subbanna Bhat*, A 1975 Kam 162), but the statement must be relevant to the inquiry (*Babu Prasad* v. *Mudomal*, 11 ALJ 193; *Girwar Singh* v. *Siraman Singh*, 32 C 1060), and their relevancy should therefore be alleged in the defence.

MALICIOUS PROSECUTION *(w)*

No. 206—Suit for Malicious Prosecution.

1. On January 4, 1993, the defendant filed a complaint before the Sub-divisional Magistrate of Roorkee, charging the plaintiff with having enticed away the defendant's wife.

A police report under section 202, Cr. P.C. is absolutely privileged (*Veni Madho* v. *Wajid Ali*, 167 IC 433, A 1937 All 90; *K.Ramdas* v. *Samu Pillai*, (1969) 1 MLJ 338). Statements made during investigation are, however, not absolutely privileged (*Maroti Sadashiv* v. *Gadubai Narayanrao*, A 1959 Bom 433; *Haji Ahmad Hussain* v. *State*, 1960 ALJ 109; *Chotkan* v. *State*, 1960 ALJ 668). Allegations made in pleadings are absolutely privileged only if they are relevant to the case, action will lie if they are not pertinent or are made maliciously (*Dalpat* v. *Raja Amarpal*, 6 OLJ 26, 49 IC 58; *Dhiro* v. *Gobinda*, 65 IC 204; *Nathji Muleswar* v. *Lalbhai*, 14 B 97; *B. Ganeshadutt* v. *Mangni Ram*, 11 Rang LR 321 PC; *Hindustan Gilt & Co.* v. *Chilam Kurti*, A 1943 Mad 350; *Sumati Prasad* v. *Shiv Dutt*, 1946 ALJ 60). The defendant may plead that the memorandum alleged to be defamatory is privileged and not actionable because it is a communication by one officer of State to another officer relating to a matter of State (*Fayed* v. *Al Tajir*, (1987) 2 All ER 396 see also *Hasselblad* v. *Obinson*, (1985) I All ER 173 (CA).

(4) *Qualified Privilege* such as information for public good, including information or report of a crime, character of servants, statements necessary to protect one's own interest, or those provoked by the plaintiff and fair reports of judicial or parliamentary proceedings or of a public meeting. In all these cases there is no defence, if defendant is proved to have acted maliciously. If the defendant proves that he honestly believed that the plaintiff had committed the crime imputed to him, no action would lie (*Sajjad Hussain* v. *Mulchand*, A 1926 Oudh 18, 90 IC 951; *Rustom* v. *Krishna Raj*, A 1970 Bom 424). The Allahabad High Court insists on proof of reasonable and probable cause also (*Majju* v. *Lachman*, A 1924 All 535, 46 A 671, 22 ALJ 597 FB; see contra, A 1962 Pat 229). A slanderous statement made before a caste *panchayat* is not actionable in the absence of proof of actual malice (*Daulat Singh* v. *Prem Singh*, A 1938 All 447, 176 IC 797, 1938 ALJ 638).

It is no defence for the publisher of libel that he did not originate it but heard it from another or that it was a current rumour and the defendant *bona fide* believed it to be true (*Mohammad Nazir* v. *Emperor*, 26 ALJ 509; *Hales* v. *Smiles*, 168 IC 853, A 1937 Rang 105; *Raghunath* v. *Mukandi Lal*, A 1936 All 780, 165 IC 892).

Previous conviction for the same defamation is no bar to a civil suit for damages nor can damages be reduced for that reason (*Venkayya* v. *Suraya*, A 1940 Mad 879, 1940 MWN 892).

(w) Suit for malicious prosecution in Criminal Court lies but not for malicious institution of a Civil Suit (*Mohammad Amin* v. *Jogendra*, A 1947 PC 367; see *Ram Pratap* v. *Narain Singh*, A 1965 All 172; *Parkash Chand Seth* v. *Sant*

2. A warrant was, on the said complaint, issued for the arrest of the plaintiff, and the plaintiff was arrested and was released on bail after remaining in custody for twenty four hours. He was tried on the said charge and was acquitted on July 6, 1995.

3. The defendant had brought the said charge against the plaintiff maliciously and without a reasonable or probable cause.

4. By reason of the premises, the plaintiff has suffered much physical and mental pain, and has been lowered in the estimation of his friends, and was prevented from attending to his business, and incurred expense in defending himself from the said charge.

Singh, (1972) 74 PLR 714; and *Gonu Ganpati Shivale* v. *Balchand Jairaj*, 1980 Mah LJ 879; *C.B. Agarwal* v. *P. Krishna Kapoor*, A 1995 Delhi 154). In every suit for malicious prosecution following facts should be alleged :-

(1) that the defendant initiated the proceedings against the plaintiff;

(2) that the proceeding terminated in plaintiff's favour and the way in which they terminated;

(3) that the prosecution was malicious;

(4) that it was started without any reasonable or probable cause;

(5) general damages claimed, and particulars of any special damage claimed.

The burden of proving all these facts is on the plaintiff, who must prove all of them (except No.2) independently of the findings of the criminal court whose judgement can be used only for proving point No. 2 (*Shubrati* v. *Shamsuddin*, 110 IC 413, 16 ALJ 439, 50 A 713, A 1928 All 337 DB; *Jogendra Garabdu* v. *Lingaraj Patra*, A 1970 Orissa 91; *Govindji* v. *Damodran*, A 1970 Kerala 229; *Ferozuddin* v. *Mohammad Lone*, 1977 Kash LJ 350; *Gulabrao* v. *Madhav*, A 1984 Bom 323; *Sova Rani Dutta* v. *Debabrata Dutta*, A 1991 Cal 186; *K.T.V. Krishnan* v. *P.T. Govonden*, A 1989 Ker 83). In this respect this action differs from one for false imprisonment (*vide note (o) ante*).

At least one of the following three sorts of damage must be shown to support an action for malicious prosecution:

(1) damage to man's fame as where the matter, whereof he is accused, be scandalous;

(2) damage to his person as when he is put in danger to lose his life, limb or liberty; and

(3) damage to his property as where he is forced to spend money and necessary charges to acquit himself of the crime of which he was charged.

If there was neither of these three sorts of damages, no action would lie (*Jatindra Mohan* v. *Corporation of Calcutta*, A 1941 Cal 3; *C.M. Agarwala* v. *Halar Salt and Chemical Works*, A 1977 Cal 356).

The question of liability for prosecution in cases set up by the police on information given or report made by the defendant depends on the facts of each

Particulars of Special Damage

	Rs.
Fee paid to Mr. M. Banerji, Senior Advocate for defence	2,500
Fee paid to Mr. Ali Bux, Junior Advocate for defence	1,000
Travelling and diet expenses of defence witnesses on two dates, ...	1,250
Loss of business as a druggist for one day, ...	3,000
Total	8,050

case. If the defendant did no more than make a report and the plaintiff was prosecuted by the police after independent investigation in which the defendant has not taken any part, he is not liable (*Fayaz* v. *Sardar Khan*, 187 IC 789; *Raghubar Dayal* v. *Kalen*, A 1940 All 231, 188 IC 211; *Lakshmojirao T.V.* v. *Somavarapu Venkatappaiah*, A 1966 AP 292; *Ramesh Chandra Singh* v. *Jagannath Singh*, A 1975 Orissa 121), but if he took an active part, e.g., he named the witnesses before the police, asked the police to search the defendant's house, etc., he is liable, though he does not appear in court as a prosecutor (*Ganga Prasad* v. *Sardar Bhagat Singh* 30 A 525 PC; *Tannumala* v. *Muddumuru*, 8 MLJ 242; *Hari Charan* v. *Kailash*, 36 C 278; *Lakshmojirao T.V.* v. *Somavarapu Venkatappaiah*, A 1966 AP 292). But when the information by the defendant to the police was directed against the plaintiff, defendant was held liable even though the plaintiff was prosecuted after police investigation (*Ram Kishan* v. *Ram Narain*, A 1934 Pat 14; *Lambodar Sahu* v. *Laxmidhar Pani*, (1972) 1 CWR 870). Where the defendant lodged F.I.R against the plaintiff for theft and assault in pursuance of which the latter was arrested, handcuffed and produced before the court, it was held that the defendant set the machinery of criminal law into motion and the suit for damages was maintainable. (*Sova Rani Dutta* v. *Debabrata Dutta*, A 1991 Cal 186). A person instigating a false prosecution with necessary knowledge and intention is also liable though he remained behind the scene (*Issardas* v. *Assudamal*, A 1940 Sindh 90; *Ramesh Chandra Singh* v. *Jagannath Singh*, A 1975 Ori 121).

If a person places before a lawyer all the facts in his possession and acts in good faith on the opinion given to him by the lawyer, it is difficult to hold that he had no reasonable and probable cause for the step that he had taken (*Municipal Board, Agra* v. *Mangi Lal*, 1950 ALJ 754).

Proceedings under security sections are also prosecutions (*Niaz Khan* v. *Jai Ram*, 17 ALJ 776, 41 A 503, 50 IC 140). Action would not lie, if the complaint is dismissed under section 203, Criminal Procedure Code without the plaintiff having been summoned (*Golab* v. *Bhola*, 38 C 880; *Shaikh Meeran* v. *Ratna*, 37 M 181; *Subhag* v. *Nand Lal*, 8 Pat 285, 118 IC 133, A 1929 Pat 271; *Deolal* v. *Remington Rand Inc*, 199 IC 755, A 1940 Nag 225; *Vattappa* v. *Mathu Karuppan*, A 1941 Mad

The plaintiff claims :

(1) Rs. 10,000 as general damages for mental and bodily pain and loss of reputation.

(2) Rs. 8,050 special damages.

(3) Interest from date of suit to that of payment.

No. 207—Ditto, Statutory Form

(Form No. 31, Appendix A,C.P.C.)

1. On the ___ day of _____19___ , the defendant obtained a warrant of arrest from _____ (a Magistrate of the said city, *as the case*

538; *Ali Mohammad* v. *Zahir*, 53 All 771), but if the plaintiff was given notice and was present at inquiry under section 202, action will lie (*Mohammad Amin* v. *Jogendra*, A 1947 PC 367; *Kambhampati Venkata Satyanarayana* v. *Kambhapati Peda Subharao*, A 1969 AP 29; *Adikandas Sahu* v. *Kasi Ram*, 1972 (2) CWR 1242).Nominal damages were awarded where accused though not served, appeared but later the order for summons was modified (*Zaharuddin* v. *Budhi*, A 1933 Pat 292).

If defendant only made a report to the police, who took the plaintiff in custody, as defendant had suspected him, and afterwards released him for want of proof, defendant was held not liable (*Nagendra* v. *Basanta*, 57 C 5, A 1930 Cal 392: *Dattatriya* v. *Hari Keshav*, A 1949 Bom 100) Mere filing a complaint to police as a result of which plaintiff's house was searched but no judicial authority was set in motion, as the complaint was found to be false was held not amounting to malicious prosecution by the defendant (*Bolandanda Pemmayya* v. *Ayaradara Kushalappa*, A 1966 Mys 13). It has been held that the test of a prosecution is not whether the proceedings reached a stage where they could be termed a prosecution but whether damage resulted to the plaintiff (*Sanatan Sahu* v. *Kali Sahu*, A 1964 Ori 187).

It is necessary that law should be set in motion by making complaint to an authority exercising judicial powers. The disciplinary authority is not a judicial authority, though it discharges its functions in a quasi-judicial manner. A proceeding before it cannot be said to be a prosecution (*D.N. Bundopadhya* v. *Union of India*, A 1979 Raj 83).

If the prosecution was false to the knowledge of the defendants no further proof of want of reasonable and probable cause will be necessary (*Bansi* v. *Hukum Chand*, A 1930 All 216). 'Malice' in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want for reasonable or probable cause (*S.R. Venkataraman* v. *Union of India*, A 1979 SC 49, (1979) 2 SCC 491). Malice can also be inferred where the object of prosecution is to provide defence in a counter case (*Bansi* v. *Hukum Chand*, A 1930 All 216), or when a false complaint is wilfully lodged

may be) on a charge of _____, and the plaintiff was arrested thereon, and imprisoned for ___ (days, *or* hours and gave bail in the sum of ___ rupees to obtain his release).

2. In so doing the defendant acted maliciously and without reasonable or probable cause.

3. On the ____ day of _____ 19___, the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff.

4. Many persons, whose names are unknown to the plaintiff, hearing of the arrest, and supposing the plaintiff to be a criminal, have ceased to

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(*Padmanabhan Gangadharan* v. *Mathevan Gangadharan*, A 1976 Ker 49). Any indirect or improper motive is malice in law (*Mahamud-ul-Hasan* v. *Md. Shibli*, A 1934 All 696, 151 IC 359; *Jogendra Garabadu* v. *Lingaraj Patra*, A 1970 Orissa 91). For burden of proof, its discharge and shifting of burden see the case of *Vijay Nath* v. *Damodar Das*, A 1971 All 109.

It is not for the plaintiff to prove or allege falsity of the charge (*Balbhaddar Singh* v. *Badri Sah*, 24 ALJ 453; *Basdeo* v. *Shyama*, 1936 ALJ 803, 164 IC 184, A 1936 All 582; *Shubrati* v. *Shamsuddin*, 26 ALJ 439, 110 IC 413, A 1928 All 337; *Issardas* v. *Assudamal*, A 1940 Sindh 90; *Sah Manji* v. *Sah Chaturbhuj*, A 1939 PC 225). Though it is not necessary to prove innocence as such, yet if the plaintiff wants to rely on his innocence as affording proof of other facts necessary for him to prove (e.g., want of reasonable and probable cause) he should prove innocence independently of the judgment of criminal court (*Khaja Hussenuddin* v. *Kisan*, 25 NLR 180, A 1929 Nag 260.) Proof of malice is not sufficient to prove want of reasonable and probable cause (*Madan Lal* v. *Lakshmi Narain*, 1938 PWN 783), but from proof of want of reasonable and probable cause and of indirect motive or recklessness in instituting the complaint, malice may be inferred (*Abubaker* v. *Manganlal*, A 1940 Mad 683, 1940 MWN 305). For distinction between malice and absence of reasonable and probable cause *see, Dev Atma Nand* v. *Shambhu Lal*, 1965 ALJ 317; and *Bharat Commerce and Industries Ltd.* v. *Surendra Nath*, A 1966 Cal 388.

Conviction by trial court subsequently set aside in appeal cannot afford evidence of reasonable and probable cause (*Mauji Ram* v. *Chaturbhuj*, 183 IC 196, A 1939 PC 225). The cases in which the accusations have been found to be false to the knowledge of the prosecutor stand on a different footing from those in which the accusations are based on information and belief. In those cases the prosecutor cannot be heard to say that there was no want of reasonable and probable cause (*Ucho Singh* v. *Nageshar Pd.*, A 1956 Pat 285). When accusation against the plaintiff was in respect of an offence which the defendant claimed to have seen him commit, and the plaintiff is acquitted by criminal court on merits, there shall be presumption that there was no reasonable or probable cause for the prosecution (*Pendekanti Subbarayudu* v. *B. Venkatanarasayya*, A 1968 AP 61; *E.Dakshinamurthy* v.

do business with him; *or*, in consequence of the said arrest, the plaintiff lost his situation as clerk to one EF; *or*, in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business and was injured in his credit and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

No. 208—Like Suit, when the Case was Sent up by the Police

1. On January 5, 1993, the defendant made a report at the Kotwali Police Station, Varanasi, charging the plaintiff with having entered defendant's house and having taken away the defendant's valuable goods and documents.

K. Venkataswami Chettiar, A 1972 Mad 241; *Girja Prasad Sharma* v. *Umeshankar Pillai*, A 1973 MP 79).

In assessing damages, the court will have to consider (1) the nature of offence the plaintiff was charged of (2) the inconvenience to which plaintiff was subjected, (3) monetary loss, and (4) the status and the position of the plaintiff. Damages awarded for loss of reputation are in the nature of solatium and are not given for punishing the defendant or for enriching the plaintiff (*C.M. Agarwala* v. *Halar Salt and Chemical Works*, A 1977 Cal 356). Some damages must be claimed for reputation and bodily and mental suffering, and special damages actually suffered, such as the cost of defence, loss of business, etc., must also be claimed. If cost was defrayed not by plaintiff but by another person, plaintiff cannot recover it. Special damages should be specifically proved, no damages can be allowed for the plaintiff's shop having remained closed without proof of consequent loss and on mere proof that plaintiff pays income-tax (*Gyasiram* v. *Kishore*, A 1930 All 165). Plaintiff can get damages for loss of service during the pendency of the criminal case (*Raghunath* v. *Motiram*, A 1933 Rang 299). For distinction between suits for malicious prosecution and false imprisonment see note under "False Imprisonment".

For the liability of the State for acts of its servants, see *Md. Murad* v. *State of U.P.*, A 1956 All 75; *State of U.P.* v. *Kasturi Lal Ralia Ram Jain*, A 1965 SC 1039; *State of Bihar* v. *N.P. Jain*, A 1963 Pat 290 and *State of Rajasthan* v. *Mst. Vidyawati*, A 1962 SC 833; *SAHELI a Women's Resources Centre* v. *Commr. of Police, Delhi*, A 1990 SC 513; *Rajmal* v. *State*, A 1996 Raj 80). See also notes under precedents of Motor Accident Claim application, *post*.

Magistrate negligently issued warrant of arrest and acquitted person was arrested. Damages were awarded against the Magistrate personally (*State of U.P.* v. *Tulsi Ram*, A 1971 All 162.

Limitation : One year from date of acquittal or termination of proceeding (Article 74). If the defendant applies for revision from the order of discharge, limitation

2. On January 8, 1993, the police arrested and sent up the plaintiff to the Judicial Magistrate for trial and the said Magistrate remanded the plaintiff to custody. The police submitted charge sheet on February 15, 1994 and the plaintiff was thereafter tried on the said charge. On February 20, 1995, the said Magistrate acquitted the plaintiff.

3. The real prosecutor of the plaintiff on the said charge was the defendant. The defendant misled the police by producing perjured witnesses before them during the investigation, and by falsely stating to the police that several articles belonging to the plaintiff and found at the time of search of the plaintiff's house belonged to the defendant. The defendant remained in court during the trial and assisted the public prosecutor by instructing him in opposing the plaintiff's application for bail and in the examination and cross-examination of the witnesses for the prosecution and the defence.

4 and 5 and prayer. *Same as 3 and 4 and prayer in precedent No. 206.*

No. 209—Suit for Malicious Prosecution and False Imprisonment

1. On October 20, 1994, the defendant wrongfully arrested the plaintiff at his house at Hardwar, kept him in *havalat* during the night and in the morning sent him up in handcuffs to the court of the Judicial Magistrate of Roorkee on a false charge of theft.

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will run from the dismissal of revision (*Madan Mohan* v. *Ram Sunder*, 125 IC 464, A 1930 All 326; *Bhagat Raj* v. *Garai*, 1937 AWR 1113, 1937 ALJ 1281; contra *Purshottam* v. *Ravji*, A 1922 Bom 209, 47 B 28, 67 IC 754, 24 BLR 507).

Forum : Suit must be instituted where plaintiff was prosecuted or where defendant resides; but it has been held that the cause of action partly arises also where the plaintiff receives summons of the criminal case (*Alexandra* v. *Indra*, A 1933 Cal 706).

Defence : is usually truth of the charge. But it must be understood that it is not always easy to prove truth though it may be easy to show that defendant had a reasonable and probable cause for instituting the prosecution. In such cases truth should not be pleaded, as an attempt to prove the truth may only result in heavier damages being awarded. Truth and existence of reasonable and probable cause may be pleaded in the alternative. If reasonable and probable cause is pleaded affirmatively particulars should be given. But if the plea is only a denial of the plaintiff's allegation of the absence of a reasonable and probable cause, no particulars will be necessary.

2. The plaintiff had to give bail and was released by order of the said Judicial Magistrate late in the evening of October 21, 1994.

3. The said Magistrate tried the plaintiff on the said charge of theft and acquitted him on November 5, 1995.

4 and 5. *As 3 and 4 in precedent No 206.*

The plaintiff claims :

(1) Rs.5,400 as general damages for false imprisonment.

(2) Rs.4,500 as general damages for malicious prosecution.

(3) Rs.4,496 as special damages.

(4) Interest from date of suit to that of payment.

NEGLIGENCE *(x)*

No. 210—Suit for Injuries Caused to the Plaintiff by Negligent or Rash Driving

1. On February 20, 1996, the plaintiff was driving his *tonga* along the Chandni Chowk Road, Delhi, when the defendant's coachman, while, acting in the course of his employment as such, so negligently drove the defendant's *landau* that they came into collision with the plaintiff's *tonga*.

Particulars of Negligence

The plaintiff was driving from the Fort side to the Fatehpuri side and when his *tonga* reached the Dariba Kalan junction, the defendant's *landau* came from Dariba Kalan, being driven at a very rapid pace on the wrong side of the road, and suddenly turned sharply round the corner towards the Fort and so came into collision with the plaintiff's *tonga*.

2. The said collision caused severe injuries to the plaintiff's person and his horse, and damage to his *tonga*.

(x) In every claim based on the negligence of the defendant or his servant or agent, **the plaintiff is bound to allege the following facts :**

(1) Facts showing that the defendant owned a duty to the plaintiff, as mere negligence, unless it amounts to a breach of any duty, will not afford a cause of action. The duty may be one arising out of contract, or one created by law, or one which all citizens owe to each other, e.g., that no person shall run down another, etc. The facts on which such duty is founded must be stated. If the duty arises out of contract, the contract must be pleaded, but if it is a legal or general duty which is presumed by law, it is not necessary to state its existence, and it would suffice to set

Particulars of Injuries

The plaintiff's left arm was broken and he received several bruises, was ill and suffering for two months and was unable to attend to his business as a medical practitioner. The front legs of the plaintiff's horse were broken for which it had to be in the veterinary hospital for three months, and has become permanently lame.

The off-shaft of the *tonga* was broken, as also the off-wheel, and the axle was bent.

Particulars of Damages Claimed

	Rs.
Fee to Dr. Sen for treatment of the plaintiff ...	500
Fee paid to Taj Din, Compounder	60
Chemist's bill	100
Loss of business as a medical practitioner for two months	1,000
Hospital Expenses for horse	90
Depreciation of value of the horse	200
Cost of repair to *tonga* paid to Messers Rodwell & Co., Delhi	100

The plaintiff claims Rs.500 as general damages, and Rs.2,050 as special damages, with interest from date of suit to that of payment.

No. 211—Suit for Injuries Caused to Plaintiff by Negligent or Rash Driving

(Form No. 30, Appendix A, C.P.C.)

1. The plaintiff is a shoemaker, carrying on business at_____ The defendant is a merchant of _____.

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out the facts and to state generally that the defendant acted negligently.

(2) Facts showing that the duty was not performed. Full particulars of the alleged negligence must be set out, but if negligence can be presumed from any act or conduct, the act or conduct must be set out, e.g., when the injurious agency is under defendant's management and if an accident happens which ordinarily does not happen if those who have the management use proper care, defendant's negligence will be presumed. In such cases an allegation of the fact of defendant's management and the accident are sufficient. The maxim *res ipso loguitur* is applicable

2. On the ___ day of _____ 19___, the plaintiff was walking southward along Chowringhee, in the city of Calcutta, at about 3 O'clock in the afternoon. He was obliged to cross Middleton Street which is a street running into Chowringhee at right angles. While he was crossing this street, and just before he could reach the foot-pavement on the further side thereof, a carriage of the defendant's drawn by two horses under the charge and control of the defendant's servants, was negligently, suddenly, and without any warning, turned at a rapid and dangerous pace out of Middleton Street into Chowringhee. The pole of the carriage struck the plaintiff and knocked him down, and he was much trampled by the horses.

3. By the blow and fall and trampling the plaintiff's left arm was broken and he was bruised and injured on the side and back, as well as internally, and in consequence thereof the plaintiff was for four months ill and in pain, and unable to attend to his business, and incurred heavy medical and other expenses, and sustained great loss of business and profit.

No. 212—Injuries Caused by Negligence on a Railroad

(Form No. 29, Appendix A, C.P.C.)

1. On the ____ day of _____ 19___, the defendants were common carriers of passengers by railway between _____ and _____.

2. On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway.

3. While he was such passenger, at _____ (*or*, near the station of _____, *or*, between the station of _____ and _____), a collision occurred on the said railway caused by the negligence and unskilfulness of the defendant's servants whereby the plaintiff was much injured (having his leg broken, his head cut, etc., and *state the special damages, if any*

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in such cases which means that the transaction speaks for itself.

(3) That the alleged negligence was the proximate cause of injury or damage to the plaintiff (*Governor-General of India in-Council* v. *Bibi Sahiman*, A 1949 Lah 388).

A suit would lie against government for torts committed by its servants in the course of their employment in a business or commercial undertaking owned by the state. But the state is not liable for tortious acts of its servants in the course of employment or in exercise of statutory functions delegated to them which may be referable to exercise of sovereign powers (*State of U.P.* v. *Kasturi Lal*, A 1965 SC 1039; *State of M.P.* v. *Chiranji Lal*, A 1981 MP 65).

as), and incurred expense for medical attendance, and is permanently disabled from carrying on his former business as (a salesman).

[*Relief claimed*]

* * * *

(*Or, thus* : 2. On that day the defendants by their servants so negligently and unskilfully drove and managed an engine and a train of carriages attached thereto upon and along the defendant's railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plaintiff, whereby, etc., *as in para* 3).

(*See also Railway Claims Tribunal Act 1987*).

No. 213—Injury Caused by Professional Negligence of Surveyor

1. Plaintiff wanted to acquire a house for his residence and came to know that house No.....situated at.....was to be sold by its owner Sri.....

2. The price demanded by the said owner for the said house was Rs.2,00,000 (Rupees two lacs).

3. Defendant is an architect, valuer and surveyor, and is registered with the Architects Council of India and is a valuer registered with the Wealth Tax authorities.

Normally a master is liable for negligence of his servant, if servant acts in the course of employment and principal is liable for negligence of the agent acting within the scope of his authority (*Sita Ram Motilal* v. *Gautam*, A 1966 SC 1697; *Annamalu* v. *Abithakuyambal*, A 1979 Mad 276). Where a teenage girl was electrocuted by hanging high tension wire, compensation was awarded (*Seemu* v. *Himachal Pradesh State Electricity Board*, A 1994 HP 139). Accident due to leakage to cooking gas due to fault of supplier's mechanic in fixing the cylinder, supplier was held liable and compensation awarded (*Bhagwat Sarup* v. *Himalaya Gas Co.*, A 1985 HP 41). It is the duty of the authority operating and maintaining supply of electricity to see that the overhead electric lines are perfectly in order and that there is no visible possibility and apprehension of wire being snapped and sparks being released from them resulting in electrocution and fire to the property. The maxim '*res ipsa loquitur*' applied to the case. The dependents of the deceased were also granted interim relief under the inherent powers of the court (*T. Gajayalakshmi Thayumanavar* v. *Secretary P.W.D., Government of Tamil Nadu*, A 1997 Mad 263 DB; *R.S.E.B.* v. *Jai Singh*, A 1997 Raj 141).

4. As plaintiff wanted to assure himself of the soundness of the said house and of the reasonableness of the price demanded by the owner before purchasing it, he commissioned the defendant to make a full structural survey of the house. A sum of Rs.2,500 was paid to the defendant by plaintiff as the agreed fee.

5. Defendant on May 5, 1995, reported to plaintiff that after structural survey he had found that the house was in a sound condition and that it was a reasonable buy at the said price.

6. Acting upon the expert professional advice of defendant as aforesaid, plaintiff purchased the house for the said price from its previous owner and thereafter moved into the house for residing therein.

7. Plaintiff thereafter discovered the following structural defects in the house to which defendant had failed to draw plaintiff's attention, namely:

(a) .....

(b) .....

(c) .....

(d) .....

8. Plaintiff got the said defects removed by getting necessary repairs carried out at a cost of Rs.40,000.

9. While the said repairs were being carried out plaintiff and members of his family were compelled to manage and reside in a single room as the other parts of the house had to be handed over to the contractor and his masons for carrying out those repairs. Plaintiff thus suffered vexation,

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It should be noted that in view of sections 165 and 166 to 175 Motor Vehicles Act, claims for compensation in respect of accidents involving death or a bodily injury to persons arising out of the use of Motor Vehicles lie to the claim tribunals appointed under section 110 and the jurisdiction of civil courts with regard to such suit is barred. Similarly under the Railways Claims Tribunal Act, 1987 claims for compensation in respect of railway accidents lie to the tribunals appointed under section 13 (1) and the jurisdiction of civil courts with regard to such claims have been barred by section 15 of the Act. *See also* notes under Railways and Carriers, *ante*. Against the award of the Tribunal an appeal lies to the High Court. General damages may be presumed by the court, while special damages have got to be specified in petition and proved in the evidence (*Adam Khan Mohammad* v. *Ramesh Raja Naik*, 1978 ACJ 409, (1978) 2 Kam LJ 148). Even before the Tribunals it will be desirable to observe the rules of pleading. For motor accident claims, see precedents and notes under applications *post*.

namely, distress, discomfort and all the other natural consequences of living in a house in a defective condition, for a period of three months from July to September, 1995.

10. Plaintiff assesses the damage caused by such denial of use of the said building for a period of three months and by such vexation as Rs.10,000.

11. Had the said defects in the house been brought to his notice, plaintiff would not have agreed to pay more than Rs.1,50,000 which would be the proper market value, at the time of purchase, of the house subject to those defects.

12. It was an implied term of the contract between plaintiff and defendant that defendant would exercise the degree of care to be expected of a reasonable competent surveyor. Defendant was in breach of contract by failing to exercise the said degree of care, for if it had been exercised the defects would have come to the notice of defendant.

13. Defendant who owed a duty of care towards the plaintiff was also guilty of professional negligence.

14. Plaintiff has suffered damages as a result of defendant's breach of contract and of negligence :

Particulars of Damages

(i) Difference in price which plaintiff would have paid for the house if the defendant's report had been carefully made from that which he in fact paid owing to defendant's negligence; in the

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Professional Negligence: A person engaged in a profession, such as a legal or medical practitioner, architect, surveyor, valuer, accountant or analyst, including a body of persons (a body running a hospital, a firm, a company, etc.) engaged in supplying such professional services owes a duty of care towards his client or patient. Even the best professional may not always be successful despite his skill and care and he would not be liable for such failure. Even a best surgeon cannot guarantee the success of all operations. In some operations the average success rate is very low and the surgeon may warn the patient and his relatives of the slim chances of success, and yet the latter may insist on his taking the risk because of the realisation that the alternative to it is sure imminent death. They cannot then charge the surgeon with professional negligence on the ground that he should not have performed such a risky operation or that he was unsuccessful.

alternative Rs. 40,000, cost of repair incurred by plaintiff which he would not have to incur if the report had been carefully made

(ii) Damages for vexation and for loss of use of accommodation during the period of repairs.

Total 60,000

Plaintiff claims Rs.60,000 as damages besides interest from date of suit to that of payment.

No. 214—Injury Caused by Professional Negligence of Doctor

1. Plaintiff's mother Smt. Rashmi was in the family way and during the period of her pregnancy, right upto delivery on April 4, 1996 and thereafter was under the medical care of defendant who is a gynecologist and obstetrician of repute and runs.....Nursing Home at ..... The delivery took place at the said nursing home and the plaintiff was the child born on the occasion.

2. The pregnancy of plaintiff's mother had been difficult and she had been in labour for over twenty-four hours from the afternoon of April 3, 1996.

A professional expert is, however, not immune if he fails to take reasonable care, he will be liable in tort for damages or an injury caused by his negligence (For a detailed statement of law on civil liability of doctors, see Halsbury's Laws of England, 4th Ed. Vol. 30, paras 34 to 40 and 3rd Ed. Vol. 38, para 1251). The House of Lords has held in *Whitehouse* v. *Jordan*, (1981) 1 WLR 246, (1981) 1 All ER 267 (on the facts of which case, precedent No. 214 is based) that while some errors of 'clinical judgment' may be completely consistent with the due exercise of professional skill, other acts or omissions in the course of exercising clinical judgment may be so glaringly below proper standards as to make a finding of negligence inevitable (On facts, negligence was negatived).

In a recent case before the Court of Appeal in England, a deformed child was born and it was contended in a suit on behalf of that child and her mother that due to an infection of German measles received by the mother the doctor ought to have advised abortion. Due to his negligence the child and mother suffered in that the child was born with a congenital deformity. It was held (*Mekay* v. *Essex Area Health Authority*, (1982) 2 All ER 777) that the duty owned to an unborn child was a duty not to injure it and the duty owned to the mother was to advise her of the infection and its potential and serious effects and on the desirability of an abortion in those circumstances. The claim to that extent was held maintainable. But the

3. Defendant on the evening of April 4, 1996 decided to perform a "trial of forceps delivery", a delicate procedure performed with a view to establishing whether delivery *per vaginam* rather than by caesarian section was possible.

4. Defendant pulled on the baby six times with forceps but when there was no movement on the fifth and sixth pulls she decided to abandon that procedure in favour of a caesarian section.

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claim of the child that the foetus had a legal right to die in such circumstances and that she suffered the injury of having been wrongfully given birth was held not tenable, for such a claim for 'wrongful life' would be contrary to public policy as a violation of the sanctity of human life. In the celebrated "thalidomide" cases, on the other hand, it was *assumed* that action for injury caused to child in womb lies (*Distillers Co* v. *Thompson*, 1971 All ER 694, 1971 AC 458); hence the question of maintainability of a claim for wrongful life is still an open question so far as Indian Courts are concerned. For injury caused by doctor's negligence, see also *Chatterton* v. *Gerson*, (1981) 1 All ER 257 QB; *Ram Bihari Lal* v. *Dr. J.N.Shrivastava*, A 1985 MP 150.

The medical practitioners cannot claim immunity on the ground that they are governed by the Indian Medical Council Act, and are subject to the disciplinary control of Medical Council of India and/or State Medical Councils. They do not enjoy any immunity and they can be sued in contract or tort on the ground that they have failed to exercise reasonable skill and care (*Indian Medical Association* v. *V.P. Shantha*, (1995) 6 SCC 651). For the duties of a medical practitioner towards patient and standard of proficiency required from a medical practitioner see *Laxman* v. *Trimbak*, A 1969 SC 128; *Parmanand Katara* v. *Union of India*, A 1989 SC 2039; *P.N.Rao* v. *G. Jayaprakasu*, A 1990 AP 207; *Achutrao Haribhan Khodwa* v. *State of Maharashta*, (1996) 2 SCC 634 (case-law discussed).

In cases where the doctors act carelessly and in a manner which is not expected of a medical practitioner, then in such a case an action in torts would be maintainable (*Achutrao Haribhau Khodwa* v. *State of Maharashtra*, (1996)2 SCC 634). Where a doctor is found negligent but no loss or injury has resulted therefrom, no claim for damages lies, as damage is a necessary element of the cause of action in tort (*Sidhraj Dhadda* v. *State*, A 1994 Raj 68).

On negligence of share brokers resulting in economic loss, see *Stafford* v. *Cont. Commodity Services Ltd.*, (1981) 1 All ER 691, QBD.

On negligence of surveyors see *Perry* v. *Sidney Phillips & Sons*, (1982) 1 All ER 1005, on appeal (1982) 3 All ER 705 (Where plaintiff purchased a house on faith of the report of the surveyor who had certified it to be in a good condition whereas it was found to be in a very bad shape. Damages awarded on account of difference on date of breach in the price which plaintiff would have given if the report had been carefully made from that which he in fact gave owing to negligence of surveryor

5. Shortly after her birth the baby (plaintiff) was found to be suffering from severe brain damage as per particulars given below:

Particulars of the Injury

* * *

6. The said brain damage was sustained in the course of the trial of forceps delivery due to the negligence of defendant as per particulars given below:

Particulars of the Negligence

(a) Defendant's decision to perform a "trial of forceps delivery" was much too belated. Postponement of the decision from the morning till the evening of April 4, 1996 and failure thereafter to proceed with Caesarian section straightway was glaringly below proper standards of professional care and skill.

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and also on basis of expense in repairing the house and also damages for (a) the inconvenience and discomfort which the plaintiff would suffer for the period of repairs and (b) the distress and discomfort already suffered by him which was caused by the defective condition of the house). (See also *Dodd Properties* v. *Canterbury C.C.*, (1980) 1 WLR 433; *Brandeis Goldshmidt & Co. Ltd.* v. *Western Transport Ltd.*, (1981) QB 864; *Philips* v. *Ward*, (1956) 1 WLR 471; *Ford* v. *White & Co.*, (1964) 1 WLR 885 on measure of damages). Where a surveyor gives his report not to the plaintiff but to a building society from which the plaintiff purchases or obtains a mortgage of the house on the faith of that report, then too the plaintiff can recover damages from him even in the absence of any contract or fiduciary relationship; it has been held that a negligent, though honest, misrepresentation, spoken or written, may give rise to an action for damages for financial loss caused thereby, since the law implies a duty of care when a party seeking information from a party possessed of special skill trusts him to exercise due care and the latter knew or ought to have known that reliance was being placed on his skill and judgment (*Yianni* v. *Evans & Sons*, (1981) 3 WLR 843, following the rule laid down by House of Lords in *Hedley Byrne & Co.* v. *Heller*, 1964 AC 465).

Limitation : Suits for compensation for defendant's negligence will be governed by Article 113 (three years). In a suit on tort based on professional negligence of engineer, limitation starts from when damage is first actually caused to the building and not from when it is first discovered (*Pirelli General Cable Works Ltd.* v. *Oscar Faber*, (1983) 2 WLR 6 HL).

Defence : The defendant might show contributory negligence of the plaintiff himself, or that the damage and injury caused was the result of a pure accident, or of a wrongful act or negligence of third party for whose acts he is not responsible. He may deny that there was any damage to the plaintiff. In case of tort of a servant, the defendant master may plead that act was not done in the course of employment

(b) In performing "trial of forceps delivery", defendant pulled the baby too long and too hard with the forceps so that the foetal (plaintiff's) head had become wedged or stuck, thereby leading to asphyxia. The head had to be unwedged or unstuck with the use of force. Thus there was lack of normal professional care, both in getting it wedged and in having to unwedge it.

7. Plaintiff's parents thereafter got the plaintiff treated for the said injury and incurred a sum of Rs._____ as expenditure on the treatment.

Particulars of the Expenditure

* * *

8. The treatment was only partially successful and plaintiff has been disabled for life to the extent of sixty percent due to the said injury.

Particulars of the Disability

* * *

9. Plaintiff is entitled to compensation as follows :

(a) Medical expenses ... ... Rs. .....

(b) Physical and mental suffering .. Rs. .....

(c) Economic loss (loss of earning capacity) Rs. .....

Total Rs. .....

Plaintiff claims Rs.....as damages besides interest from date of suit to that of payment.

NUISANCE *(y)*

No. 215—Suit for Carrying on a Noxious Trade

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of the house to the west of defendant's open plot of land in *Mohalla* Chhipi, in the town of Aligarh.

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nor on defendant's behalf, nor for his benefit.

If plaintiff is partly to be blamed for accident he is entitled to damages in proportion to blame of defendant (*Vidya Devi* v. *M.P.State Transport Corporation*, 1974 MPLJ 573; *Commissioners* v. *Owners of S.S. Volute*, 1922 IC 129).

(y) There are two kinds of nuisance : (1) Public, and (2) Private. Public nuisance is an act affecting the public at large, and no individual can bring a suit in respect of it, unless he suffers any special injury over and above that suffered by the rest of

2. Since January 1, 1985, the defendant has started a tannery on his said plot of land and has thereby wrongfully caused to spread from the pieces of skin, which he keeps on the said open plot of land for drying, such offensive smell all over the plaintiff's house that it has become both insanitary and uninhabitable.

3. The plaintiff has, in consequence, abandoned his residence of the said house, and has taken another house on a rent of Rs.230 per month, and no one is ready and willing to take the plaintiff's said house on rent on account of the said nuisance. The plaintiff has therefore suffered damage.

Particulars

Loss of rent, at Rs.230 for 4 months.....Rs.920.

The plaintiff claims :

(1) A prohibitory injunction to restrain the defendant from spreading the offensive smell over the plaintiff's house.

(2) Rs.920 as damages.

(3) Future damages at Rs.230 per month up to date the defendant obeys the said prohibitory order.

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the public, and unless that injury is substantial and the direct cause of the nuisance. [See full discussion of this in note (k)]. A suit in respect of such nuisance, either for declaration or injunction may, however, be instituted under section 91 C.P.C. by the Advocate General or any two or more persons with the permission of the court and in that case no special injury has to be shown. Such power may with the previous sanction of the State Government be, outside Presidency towns, exercised by collectors or any other officer as the State Government may appoint in this behalf (section 93).

A suit by one party who wants to use a highway in a particular manner against another who obstructs him in such use is not a suit relating to a public nuisance and such a suit for declaration or injunction can be brought without proof of special damage (*Surendra* v. *District Board, Nadia*, A 1942 Cal 360; *Pailappan* v. *Sebastian*, 1988 (1) KLT 701; *Godavari* v. *Cannanore Municipality*, A 1985 Ker 21). A neighbour can also sue for [illegible] to restrain construction of a building in breach of municipal bye-laws or other like regulation (*Onkar Nath* v. *Ram Nath*, A 1985 Del 293, relying on *K.Ramadas Shenoy* v. *Town Municipal Council*, A 1974 SC 2177). The pollution of "Public Waterway" constitutes public nuisance (*Rajadhiraj Industries Pvt Ltd.* v. *Nauhelal Beghel*, (1988) 2 Cur CC 69 (MP).

Private nuisance is act affecting a particular individual or individuals. If the individuals affected are limited in number, the nuisance is not public, whatever may be the number (*Ramghulam* v. *Ram Khelawan*, 167 IC 798, A 1937 Pat 481). It is also

No. 216—Suit for Carrying on a Noxious Manufacture

(Form No. 24, Appendix A, C.P.C.)

1. The plaintiff is, and at all the times hereinafter mentioned was, possessed of certain land called _____ situate in _____.

2. Ever since the __ day of _____ 19__, the defendant has wrongfully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwholesome smoke and other vapours and noxious matter, which spread themselves over and upon the said lands, and corrupted the air, and settled on the surface of the said lands.

3. Thereby the trees, hedge, herbage, and crops of the plaintiff growing on the said lands were damaged and deteriorated in value, and the cattle and livestock of the plaintiff on the said lands became unhealthy and some of them were poisoned and died.

4. The plaintiff was unable to graze the said lands with cattle and sheep as he otherwise might have done, and was obliged to remove his cattle, sheep, and farming stock therefrom, and has been prevented from having so beneficial and healthy use and occupation of the said lands as he otherwise would have had.

No. 217—Suit for Discharging Water on Plaintiff's Land

1. The plaintiff owns a piece of land bounded as follow, in *mohalla* Khattrain, in the city of Meerut, and to the west of the said land is a house belonging to the defendant.

Boundaries of the Plaintiff's Land

* * * * *

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of two kinds : (1) producing personal discomfort, e.g., noise, bad smell, etc., (2) causing some injury to property, e.g., discharging foul water on anothers property, emitting smoke, destroying plants and trees, etc. Injury to personal comfort does not always amount to a nuisance, but the question generally depends on attendant circumstance. What may be a nuisance at one place, e.g., in the country, may have to be tolerated in another place, e.g., a busy town. But such consideration would not apply when there is a sensible injury to property resulting from the nuisance. It is also necessary that the act complained of should be an inconvenience materially interfering with the ordinary physical comfort of human existence, not merely according to elegant and dainty modes and habits of living but according to

2. In the first week of December, 1983, the defendant (i) opened a *mori* or drain in the eastern wall of his house through which he discharges the water of his latrine, (ii) constructed three water spouts in the said wall through which he discharges the rainwater of his roof on the plaintiff's said land, and (iii) has opened a door in the said wall through which he passes over the plaintiff's said land. All these wrongful acts of the defendant are calculated to injure the plaintiff's property.

The plaintiff claims an injunction to restrain the defendant from discharging water through the *mori* and the three spouts on the plaintiff's said land, and from passing over the said land.

No. 218—Representative Suit in Respect of a Public Nuisance

1. In the first week of September, 1984, the defendant constructed a *chabutra* in front of his residential house on a public street known as Maliwara Bazar in Delhi.

2. The said construction has narrowed the said street at that particular point and has obstructed the passage of the public in carriages and tongas along the said street.

3. The defendant, though requested by the plaintiffs by a registered letter dated October 10, 1984, to remove the said *chabutra*, has failed and neglected to do so and, unless restrained from doing so, intends to maintain the said obstruction.

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plain, sober and simple notions obtaining among the people (*Thakurdas Meghraj* v. *Bhawanji*, 167 IC 145, A 1937 Sind 8). For principles to determine if nuisance is actionable see *Ram Lal* v. *Mustafabad Oil & Cotton Ginning Factory*, A 1968 Punj 399. It is not merely on the ground of nuisance that restrictions can be imposed on the construction of buildings, and it has been held that an injunction to restrain the use of a building as mosque can be granted on proof that it would lead to communal disturbances (*Khaji Dodda* v. *Nanippa*, A 1937 Mad 348, 185 IC 554).

On discharge of chimney smoke towards plaintiffs house, see *B. Venkatappa* v. *B. Lovis*, (1984) 2 An WR 297; towards plaintiffs grove and trees (*Subhash Narayan* v. *Ram Narain*, A 1994 All 120; *Hansraja* v. *2nd Additional District Judge Gorakhpur*, 1981 All LJ 183; *Gabga Bricks Udhyog* v. *Jai Bhagwan Swarup*, A 1982 All 333); on discharge of roof water, see *Panna* v. *Ram Saran*, 1933 ALJ 1006; on construction of non-flush system latrine, see *Abdul Hakim* v. *Ahmed*, A 1985 MP 88, 1984 MPLJ 578; on use of a neighbouring flat as lodging house, see *Hardayal* v. *Nirmala Devi*, A 1984 Del 350.

4. The plaintiff has obtained the leave of the court to bring this suit on behalf of all member of the public passing as aforesaid along the said street.

The plaintiff claims :

(1) A declaration that the said street is a public street and the defendant is not entitled to obstruct the passage of the public along the same.

(2) An order to the defendant to remove the said *Chabutra.*

(3) An injunction to restrain the defendant from obstructing the passing of the public along the said road.

(*NB.*—No claim for damages can be added to this suit under section 91 C.P.C. If the plaintiffs have sustained any special and extraordinary damage by the nuisance, they bring a separate suit).

The injury caused by the nuisance must be real and substantial and mere temporary inconvenience from noise or dust caused by lawful exercise of a man's profession, and without negligence, is not actionable. The actual occupier alone (e.g., a tenant) can bring a suit for nuisance of a temporary character, but if the injury is of a permanent character the landlord should bring the suit. A suit for nuisance must be brought against the person actually committing it, but if it is committed by a servant or agent for the master, the latter should be sued. An owner who lets or sells property with a nuisance on it may be sued for the nuisance.

The nuisance and injury to the plaintiff should be alleged. If there are special circumstances which make the act, a nuisance, though ordinarily it would not be so, they must be alleged. **In case of public nuisance the special injury to the plaintiff must be alleged with sufficient details and particulars.** If no particulars are given, general allegations will not do (*Raj Chandra* v. *Mohin Chandra*, 91 IC 728, A 1926 Cal 549 DB), but the Patna High Court took a more lenient view and held that this omission is not fatal (*Khurshed Hussain* v. *Secretary of State*, 169 IC 66, A 1937 Pat 302). There are clearly two modes of escape from the special restrictions of section 91: (i) by proof of special damage and (ii) by proof of the invasion of the special rights of a limited class which will give an independent right of action (*Bibhuti Narayan* v. *Mahadev Asram*, A 1940 Pat 449; *Gajadhar Prasad Ganga Prasad Shukul* v. *Rishal Kumar Mohan Lal*, A 1949 Nag 319).

A suit for removal of an obstruction on a village pathway is not covered by section 91, C.P.C. as the path could by no means be described a public highway (*Dalgovinda Mahatha* v. *Khatu Mahatha*, A 1948 Pat 183), but one in respect of which a customary right recognised by section 18 Easement Act, is claimable.

The plaintiff may claim damages or injunction. Damages will be allowed in all cases of nuisance to property where the injury is present and substantial, and in case of physical discomfort only when the act amounts to a nuisance. Injunction

No. 219—Ditto
(Form No. 37 Appendix A,C.P.C)

1. The defendant has wrongly heaped up earth and stones on a public road, known as _____ street, at _____, so as to obstruct the passage of the public along the same and threatens and intends, unless restrained from so doing, to continue and repeat the said wrongful act.

2. The plaintiff has obtained the leave of the court for the institution of this suit.

The plaintiff claims :

(1) A declaration that the defendant is not entitled to obstruct the passage of the public along the said public road.

(2) An injunction restraining the defendant from obstructing the passage of the public along the said public road and directing the defendant to remove the earth and stones wrongfully heaped up as aforesaid.

No. 220—Suit by an Individual in respect of Public Nuisance

1. The plaintiff is a medical practitioner, and his medical hall is situate on the public road called the Mor Ganj Road in the town of Saharanpur.

2. The defendant is a grain merchant and has for the last six months been occupying the shop which adjoins the plaintiff's said medical hall on the north and opens on the said public road.

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will be granted when the injury is continuous or defendant threatens to repeat the nuisance, or there is a probability that further nuisance will arise. Injunction will not be granted except in extreme cases, when the nuisance is temporary and occasional. A mandatory injunction will not be granted if a prohibitory injunction will serve the purpose, e.g., in case of a latrine there should not be a prayer for its demolition, but for an injunction to restrain the defendant from using it as a latrine (*Rama Rao* v. *Martha Sequeira*, 42 M 796, 37 MLJ 234, 52 IC 921). In the case of latrine which is a private nuisance, defendant can be ordered to build the latrine upon latest scientific patterns, e.g., by putting up a spring door (*Krishna Chandra* v. *Gopal Chand*, 39 PLR 664) and can be restrained in regard to its capacity being overtaxed (*Dattartraya* v. *Gopisa*, 101 IC 810 Nag). So in case of defendant's opening a door on plaintiff's land but in defendant's own wall, the suit should not be for closing the door, but for an injunction to restrain the defendant from passing over the plaintiff's land. But where something is to be done on the property of the defendant to remove the nuisance, e.g., cutting a tree or demolishing a wall, a mandatory injunction can be claimed.

3. Ever since his occupation of the said shop, the defendant has been every day from 6 a.m. to 1 or 2 p.m., wrongfully exposing heaps of various kinds of grain on the said public road in front of the plaintiff's medical hall, as a result of which the plaintiff and his patients are put to great inconvenience when coming to, and going from, the said medical hall, by not being able to bring their carriages and cars right up to the medical hall door and having to leave the same in middle of the road and to walk over the grain scattered by the defendant in front of the said medical hall.

4. the defendant does not discontinue the said nuisance and threatens to continue and repeat it unless restrained by injunction.

The plaintiff claims :

(1) Rs.2,500 as damages.

(2) A perpetual injunction restraining the defendant from keeping or scattering grain on the said public road in front of the plaintiff's medical hall.

No. 221—Suit for Polluting the Water under the Plaintiff's Land

(Form No. 23, Appendix A, C.P.C.)

1. The plaintiff is, and at all the time hereinafter mentioned was, possessed of certain land called _____ and situate in _____, and of a well therein, and of water in the well, and was entitled to the use and benefit of the well and of the water therein, and to have certain springs and streams of water, which flowed and ran into the well to supply the same to flow or run without being fouled or polluted.

2. On the ___ day of _____ 19___, the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water flowed into the well.

Limitation : See note on Limitation in cases of wrongs to Easement, *ante.*

Defence : The defendant may plead that the alleged act does not amount to a nuisance, or that the injury to the plaintiff from the same is not direct or substantial. He may plead that he has acquired, by prescription, a right to continue the alleged nuisance. When pleading this, he will have to give all the particulars necessary for such a claim. If he has altered the mode of enjoyment of the alleged easement causing addition to be burden on the servient heritage, he may plead any of the

3. In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and benefit of the well and water.

No. 222—Suit for Injunction Restraining Nuisance

(Form No. 36, Appendix A, C.P.C.)

1. Plaintiff is, and at all the times hereinafter mentioned was absolute owner of [the house No._____ street, Calcutta].

2. The defendant is, and at all the said times was the absolute owner of [a plot of ground in the same street].

3. On the __ day of _____ 19__, the defendant erected upon his said plot a slaughter-house, and still maintains the same; and from that day until the present times has continually caused cattle to be brought and killed there [and has caused the blood and offal to be thrown into the street opposite the said house of the plaintiff].

4. In consequence, the plaintiff has been compelled to abandon the said house, and has been unable to rent the same.

The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further nuisance.

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three grounds mentioned in section 43, Easements Act, on which he can claim that the easement still survives. Change in the position of windows is change in the easement of light and air and cannot be permitted (*Bai Hariganga* v. *Tricamlal*, 26 B 374). Change in position of *parnalas* (or water spouts) may amounts to an addition of the burden by increasing the force of the water and will extinguish the old easement.

It is a good defence to an action for an act which is a nuisance that it was directed or authorised to be done by law, unless the statutory powers were used negligently or in bad faith (*East Freemantit* v. *Annois*, 1902 AC 213; *Nirmal Chandra* v. *Municipal Com. of Patna*, 40 CWN 1353, A 1936 Cal 707). But, if that act authorised or directed by law is not a nuisance itself but it becomes a nuisance if done negligently and the defendant has done it negligently, the law would be no defence (*Crane* v. *South Suburban Gas Co.*, (1916) 1 KB 33). No length of time can justify a public nuisance.

In case of a private nuisance affecting the personal comfort of a person, length of time would be no defence, if the plaintiff had no power to stop the nuisance (*Sturges* v. *Bridgman*, 11 Ch D 852). Laches or acquiescence may sometimes be a good defence, particularly in a suit for an injunction, for instance, to a suit for removal of a balcony overhanging the land jointly owned by the parties. It is no defence that the plaintiff himself came to the nuisance, or that the act of causing

No. 223—Suit for Injunction against Digging Plaintiff's Land (z)

1. The plaintiff is the owner of fields Nos.572, 573 and 574 in village Kailashpur, tahsil Jagadhari, district Ambala, the total area of which is 5 *hectares*.

2. On May 1, 1985, the defendant began wrongfully to dig, and is still digging, earth from the said plot for the purposes of his brick-kiln close by. He threatens and intends to continue and repeat the act, unless restrained from so doing.

3. The said fields could not, in consequence, be let to anybody for cultivation and the plaintiff has suffered damage.

Particulars

	Rs.
Expense to be incurred in re-filling the pits ...	3,000
Loss of one year's profit	2,500

The plaintiff claims :

(1) Rs.5,500 as damages.

(2) An injunction to restrain the defendant from digging any earth from the said fields.

WRONGFUL SALE *(aa)*

No. 224—Suit for Damages for Wrongful Sale of Plaintiff's Goods

1. In execution of his decree No.509 of 1984, passed by this court

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nuisance is beneficial to the public (*Shelfer* v. *City of London E.L. Co.*, 1 Ch 287), or that the place where the nuisance is created is the only place suitable for the purpose (*St. Helen's Smelting Co.* v. *Tffing*, 11 LC 642), or that the defendant is merely making a reasonable use of his property (*Reinhardt* v. *Mevasti*, 42 Ch D 658), or that reasonable care and skill are taken to prevent the nuisance (*Rapier* v. *London Tramways Co.*, 2 Ch D 588).

(z) In such cases, it will be a mistake to ask for mandatory injunction to fill up the pits. No such order can be granted in case of a nuisance which the defendant commits on the plaintiff's property. The plaintiff can remove it and recover cost of doing so as damages.

(aa) See note *(d)* about suits for damages for wrongful attachment. If the plaintiff cannot obtain release of the goods and they are wrongfully sold, his

against one Shamlal, the defendant attached, on July 10, 1984, and wrongfully sold, on September 20, 1984, the following goods of the plaintiff:

(1) Four cows worth Rs.1,500; (2) Two she-buffaloes worth Rs.1,600; (3) One mare worth Rs.2,000; and (4) Wheat worth Rs.4,000

2. The plaintiff has suffered damages thereby.

Particulars of Damages

	Rs.
Value of the property at the date of attachment as per details given above.	9,100

The plaintiff claims Rs.9,100, with interest from the date of suit to that of payment.

SEDUCTION *(bb)*

No. 225—Suit for Seduction of Wife

1. Smt. Ramo was on, November 15, 1986, and still is, the wife of the plaintiff, and the defendant on all material dates well knew this fact.

... remedy is to sue for damages for the wrongful sale. The damage is usually the value of the goods. The price fetched at the auction sale is not necessarily the measure of damages, as that may be very low, but the plaintiff can claim what the property was actually worth as also any other damages which he might have suffered by its seizure but, as the money is claimed as damages, he cannot get any interest on it from the date of seizure.

Limitation is only one year under Article 80 and that is reckoned from the date of attachment.

(bb) A father can maintain a suit for damages for the seduction of his daughter. The basis of such a suit is the plaintiff's loss of service of the daughter. If the daughter was living with the father, and the father had a right to exact service from her, that is sufficient, and actual service rendered by her need not be alleged. Similarly, a suit may be brought by a husband against anyone who entices away his wife, for loss of her affection, companionship and aid. The motives with which the defendant took away the wife or persuaded her to leave the protection of her husband are immaterial and need not be alleged in the plaint, unless they are such as will aggravate the amount of damages. Even a father who persuades his daughter to leave her husband is liable for damages (*Md. Ibrahim* v. *Gulam Ahmad*, 1 BHC 236). **The plaint should only show that the woman is the plaintiff's wife, that the defendant enticed her away, and that he, at the time, knew that she was the plaintiff's wife** (*Sobha Ram* v. *Tika Ram*, A 1936 All 454). Even if the defendant does not entice her away, but she leaves the husband's house of her own accord,

2. On November 15, 1986, the defendant wrongfully enticed and procured Smt. Ramo unlawfully against the will of the plaintiff, to depart and remain absent from the house and society of the plaintiff.

(*Or*, on the said day, the said Smt. Ramo, without any provocation or other cause and without the consent of the plaintiff and against his will, and without his knowledge, left the house of the plaintiff).

3. The defendant wrongfully and against the will of the plaintiff, on the said day, received and has ever since harboured and detained the said Smt. Ramo at his house and refused to deliver her to the plaintiff.

4. The plaintiff has thereby lost the society and services of his said wife.

The plaintiff claims Rs.1,000, as general damages, with interest from the date of suit to that of payment.

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and the defendant harbours her knowing that she has left her husband without any just cause, he is liable for damages. But if she leaves her husband on account of his cruelty or misconduct, and the defendant gives her protection from motives of humanity, he is not liable (*Philip* v. *Squire*, 1 Peake 114). A suit for damages for adultery may similarly be brought, as adultery is an actionable wrong against the marital right of the husband. In England the jurisdiction to grant damages for adultery has since 1857 been given to Divorce Courts. In India also under the Divorce Act, 1869 damages can be claimed by an application under section 34 and not by a regular suit if the plaintiff is a Christian. Regular suit is necessary if he is a non-Christian.

The damages in all such cases are more or less arbitrary, as there is no criterion for actually measuring the loss suffered by the plaintiff. But the amount should ordinarily be exemplary (*Irvin* v. *K. Dearwan*, 11 East 23), and the disgrace and dishonour suffered by the plaintiff, his feelings and social position of the parties must all be taken into consideration.

Limitation : One year from the time when loss of service by seduction occurs (Article 77) in case of daughter and servant and 3 years in case of wife (Article 113) (*Sobha Ram* v. *Tika Ram*, A 1936 All 454, case under the limitation Act of 1908).

Defence : In cases of seduction, there is very little defence except denial of the seduction, or of the plaintiff's marriage or continuance of marriage with the woman seduced. The defendant may plead that the woman had left the plaintiff's protection of her own accord owing to the cruelty or misconduct of the plaintiff, and the defendant had only given her protection from motives of humanity. But otherwise the consent of the woman to seduction or adultery is no defence.

SLANDER *(cc)*

No. 226—Suit for Slander

1. On February 8, 1996, the defendant falsely and maliciously spoke and published of the plaintiff, and of him by way of his profession as a medical man, to Sri Ram Prasad of Meerut, Sri Biharilal of Hapur, Sri Ram Narain of Ghaziabad and several other patients of the plaintiff (whose names are unknown to the plaintiff), the following words: "Dr. Ghosh may be a capable physician but his moral character is bad and he is not a fit person to be introduced into respectable families".

If any special injury is alleged, it may be alleged as follows :

2. The plaintiff was, in consequence, much injured in his reputation, and three patients named above, and several other patients whose names are unknown to the plaintiff, have ceased to call the plaintiff for consultation and treatment, and the plaintiff has thus suffered loss in his professional business as a medical practitioner, as well as injury to his general character.

The plaintiff claims Rs.2,000 as damages, with interest from date of suit to that of payment.

(cc) See also libel *ante*. Slander is an oral defamation and **all facts necessary to be alleged in a suit for libel must be alleged in a suit for slander except that the defamation was in writing. Any special damage suffered must be alleged** as that would, in any case, affect the amount of damages. In England, slander is not actionable without proof of special damage except when it imputes a criminal offence, a contagious disease, or unchastity or when any imputation injuriously affecting the plaintiff in office, profession, trade or business is made. But the restriction is not recognised in India, and any defamatory statement which is calculated to cause pain to the person defamed is actionable provided it is not a mere hasty expression spoken in anger to which no hearer would attribute any set purpose to defame (*Kashi Ram* v. *Bhabu Ram*, 17 BHC 17; *Parvath* v. *Mannar*, 8 M 175; *Sangar Ram* v. *Babu Ram*, 1 ALJ 102; *Gayadin* v. *Mahabir*, 95 IC 90, 3 OWN 443, A 1926 Oudh 363 DB; *Mst. Ramdhara* v. *Mst. Phulwatibai*, 1969 MPLJ 483). It is sufficient if the words used, excited against the plaintiff feeling of contempt and ridicule (*Suraj Narain* v. *Sita Ram*, 183 IC 236, A 1939 All 461). But if no substantial injury is caused to the plaintiff, the damages that he can get will only be nominal. The Calcutta High Court has, however, held that mere use of abuse and insulting language is not actionable without any special damage (*Girishchandra* v. *Jatadhari*, 26 C 653) e.g., calling a man outcaste (*Girdharilal* v. *Punjab Singh*, 146 IC 1078, A 1933 Lah 727).

No. 227—Like Suit, Another Form

1. The plaintiff is a road contractor and the defendant is a member of the Buildings and Roads Sub-committee of the Corporation of Allahabad.

2. The plaintiff was engaged by the said Corporation of Allahabad as a contractor to make certain roads within the limits of the said Corporation.

3. On March 4, 1996, at a meeting of the said Corporation the defendant falsely and maliciously spoke and published of the plaintiff, and of him in the way of his business as a road contractor, the following words:

"Ram Chandra, contractor, has broken his contract in many important particulars, and, from the somewhat cursory way in which I have examined his work, I can say it has been very badly done and he should not be paid a single paise without his work being thoroughly examined by the Corporation Engineer".

4. The said words were spoken to the following members of the said Corporation.

... ... (names)

5. The defendant meant, and was understood to mean thereby, that the plaintiff was dishonest and fraudulent person who claimed money to

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It must be remembered that every insulting statement will not be actionable, unless it was defamatory also (*Christensen* v. *Caster*, 41 IC 696 Low. Bur.). Also words of abuse used in the heat of a quarrel are not actionable as the person using them cannot be said to defame that person whom he abuses (*Srigineedi* v. *Tirumili*, 52 MLJ 87, 1927 MWN 83, 100 IC 90).

Limitation : One year from the date when the words are spoken or, where slander is not actionable without proof of any special damage, when such damage results (Article 76).

Defence : Same as in case of libel, except that where special damages are necessary to sustain the action, according to Allahabad High Court view the same may be denied, or may be alleged to be not the direct result of the slander. Privilege may be claimed in respect of statements by judges, counsel, parties and witnesses in the course of judicial proceedings (*K.Daniel* v. *Hyamavathi*, A 1985 Ker 233; case law discussed). Statements made to police by complainant do not form part of judicial proceedings and only qualified and not absolute privilege can be claimed for them (*Govind* v. *Pandharinath*, A 1985 Bom 224; contra : *Lachhman* v. *Pyarchand*, A 1959 Raj 169).

which he was not entitled and that the plaintiff was not fit to be trusted or employed to carry out any public work.

6. In consequence, the plaintiff was injured in his credit and reputation in his professional business as contractor, and the Zila Parishad of Allahabad and that of Mirzapur, which had formerly been employing the plaintiff as such, ceased to do so.

The plaintiff claims Rs.5,000 as general damages, with interest from date of suit to that of payment.

TRADE MARK *(dd)*

No. 228—Suit for Infringement of a Trade Mark

1. The plaintiffs have for the last 25 years manufactured and sold under the names of "Sanatogen" and "Formamint" certain chemical compounds for use in medicine and pharmacy, and within a short time the said compounds sold under the names of Sanatogen and Formamint acquired a very high reputation throughout India and the sales thereof

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(dd) See also copyright *(h) ante* for combining causes of action of copyright and trade mark. Under the Trade and Merchandise Marks Act (Act XLIII of 1958) owners of trade marks have to get them registered, because under section 27 of the Act no person is entitled to institute any proceedings to prevent or to recover damages for the infringement of an unregistered trade mark. The registration confers on the registered proprietor of the trade mark certain rights including the exclusive right to use the trade mark in relation to the goods in respect of which the trade mark is registered. **The plaintiff must prove that he is a registered proprietor of the trade mark.** Infringement has further to be shown. Infringement has been defined in section 29 as use in the course of trade of a mark which is identical with or deceptively similar to the trade mark in relation to any goods in respect of which the trade mark is registered and in such manner as render the use of the mark likely to be taken as use of the trade mark (*Sony* v. *Shamrao*, A 1985 Bom 327). Under section 27(2) of the Act an action for passing off against registered user of trade mark is maintainable at the instance of a prior user of the same, similar or identical mark. Since such a remedy is available against the registered user of a trade mark an interim injunction restraining him to use the mark can also be granted to make the remedy effective (*N.R.Dongra* v. *Whirlpool Corporation*, A 1995 Delhi 300 DB). Where the trade mark of the plaintiff is not registered, onus lies on him to prove not only similarity but also that the defendant is deceitfully passing off his goods as that of the plaintiff or there is bound to be confusion in the minds of the customers and a risk of damage (*Chhattar Extraction Ltd.* v. *Kochar Oil Mills Ltd.*, A 1996 Delhi 143).

were large and profitable and the names of Sanatogen and Formamint had come to mean chemical compounds of the plaintiff's manufacture.

2. At the end of October, 1995, the defendants inducted into the market several consignments of some substance under the names of Sanatogen and Formamint and have since then been selling the same at a much lower rate than the plaintiff's goods.

3. The general make up, marking, and appearance of the defendants' packages, apart from the use of the names of Sanatogen and Formamint, have been made to resemble closely the plaintiffs' package in order to pass off the defendant's goods as the plaintiffs' goods.

Particulars of packages of plaintiffs' goods

* * * *

Particulars of packages of defendants' goods

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4. The object of the defendant in inducting into the market and selling the said goods is to deceive the public and lead them to believe that in purchasing the inferior compounds offered for sale they were buying the genuine articles of the plaintiffs' manufacture.

5. Since the induction of the defendants' goods into the market the sale of the plaintiffs' goods has fallen considerably and the plaintiffs have suffered damage.

The Supreme Court has considered the various provisions of the Act, and explained the expressions "Aggrieved Person" "A Distinctive Trade Mark" and "Infringement and Commencement of Proceedings" and made certain important observations in the case of *National Bell Co.* v. *Metal Goods Mfg. Co.*, A 1971 SC 898. Fraudulent intention is not necessary (*Bundi Portland Co.* v. *Abdul Hussein*, A 1936 Bom 418). The mere fact that if looked at properly the defendant's trade mark was not the same as the plaintiff's is immaterial if the whole get-up of the one was like that of the other (*Juggimal* v. *Swadeshi Mills*, 56 IA 182, 27 ALJ 1, 33 CWN 242, 31 BLR 285, 114 IC 30, A 1929 PC 11; *Ibrahim* v. *Abdulla*, 65 MLJ 617). The test of comparison by placing the two marks side by side is not a sound one but what has to be seen is the element of similarity which may cause deception (*Thomas Bear Co.* v. *Prayag Narain*, A 1940 PC 86, 187 IC 658; *J&P Coats Ltd., Scotland* v. *Gurcharan Singh*, A 1969 Punj 290; *Prem Nath Mayor* v. *The Registrar of Trade Marks*, A 1972 Cal 261; *Parle Products* v. *J.P. &Co.*, A 1972 SC 1359). It is not necessary to prove actual deception (*National Carbon & Co.* v. *Sei Sen & Co.*, A 1938 Rang 99, 176 IC 597; *Firm Bhagwandas Rangilal* v. *Watkins Mayor &Co.*,

The plaintiffs claim :

(1) An injunction restraining the defendants from passing off, or attempting to pass off, and from enabling others to pass off, chemical compounds not of the plaintiff's manufacture as the goods of the plaintiff's manufacture by use of the names Sanatogen or Formamint, or by use of packages of similar make and appearance as those used by the plaintiffs for their goods.

A 1947 Lah 289), but the court should be satisfied that an unscrupulous retailer could be able to foist the defendant's goods upon an ignorant purchaser who trusts to his memory and has no opportunity of comparison (*Steel Bros.* v. *Ahmad Ibrahim*, 99 IC 723, 4 R 401; *Swadeshi Match Co.* v. *Adamjee*, 99 IC 227, 4 R 381; *Herbert Whitworth Ltd.* v. *Jamnadas*, 110 IC 312, A 1928 Bom 227, 30 BLR 514, 52 B 228 DB; *Abdul Kareem* v. *Abdul Kareem*, A 1931 Mad 461, 1931 MWN 311, 132 IC 650). Mere possibility of deception is, however, not sufficeint; there must be a reasonable probability (*Barlow* v. *Gobind Ram*, 24 C 364; *Nem Chand* v. *Wallace*, 34 C 495; *A.J. Von Wulfing* v. *Jiwan Das & Co.*, A 1926 Bom 200, 28 BLR 243, 93 IC 857).

The test is not whether the ignorant, thoughtless or incautious purchaser is likely to be misled but court has to consider an average purchaser buying with ordinary caution (*The National Sewing Thread Co.* v. *James Chadwick & Bros.*, A 1948 Mad 481, (1948) 1 MLJ 303, 1948 MWN 276; *Hari Prasad Lal Chand* v. *Nannoo Khan Hussain Bux*, A 1968 MP 234; *P.L. Anwar Basha* v. *M.Natrajan*, A 1980 Mad 56; *Arabind Laboratories* v. *Annamalai Chettiar*, (1981) 1 MLJ 75). Therefore mere phonetic similarity cannot be considered such as between "Cocogem" and "Kotogem" (*Modi Mills* v. *Tata Oil Mills*, A 1943 Lah 196; see however, *Bata India Ltd.* v. *Pyarelal & Co.*, A 1985 All 242; *B.K.Engg. Co.* v. *B.H.I.Enterprises*, A 1985 Del 210). Absence of a specific instance of confusion or deception, though not conclusive is a material consideration and a strong case must be made out to justify the conclusion that confusion will result (*Imperial Tobacco Co.* v. *Mullaji*, 168 IC 573, A 1937 Nag 158), but the Bombay High Court has held that where there is a deliberate imitation of trade mark the onus shifts on to the imitator to prove that he is not liable (*Gujarat Ginning Co.* v. *Swadeshi Mills*, 181 IC 17, A 1939 Bom 119); in the case of cigarette trade mark there is no monopoly and so a manufacturer of cigarettes under a mark of a particular device cannot object to the use to the identical mark on hats or soaps as the use cannot cause any deception (*Francis Day* v. *T.C.F. Corporation*, A 1940 PC 55).

If claim is based on the ground of fraud, fraudulent intention should also be expressly pleaded (*Adamjee* v. *Swadeshi Match Factory & Co.*, 110 IC 305, A 1928 Rang 210, 6 R 221 DB). The plaintiff can claim damages suffered by him and, if none has been suffered, nominal damages (*Thomas* v. *Prayag*, 4 AWR 1028; *Ram Kumar* v. *R. J. Wood*, A 1941 Lah 262, 195 IC 831; *Firm Kooverji* v. *Firm Adam Haji*, A 1944 Sindh 21) as he can bring a suit without waiting for the purchase of defendant's good as his (*The National Sewing Thread Co.* v. *James Chadwick & Bros.*, A 1948

(2) That an account be taken from the defendants of the profit they have made by sale of their said goods from the date of their induction into the market.

(3) Payment as damages of the amount of profits so found to have been made by the defendants.

No. 229—Suit for Passing off Goods as Plaintiffs' Goods

1. The plaintiffs have for more than 20 years manufactured and sold hair oil under the name of "Gulshan Hair Oil". The said oil is of a very superior quality and is well known to the public generally and is asked for

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Mad 481), or he may ask for account of profits made by the defendant and recovery of that amount, in addition to injunction. But if the infringement is innocent, no account can be ordered unless the infringement continues after notice of owner's right, though injunction can be granted (*Calico Printers Association* v. *Ahmad A. Bros.*, 182 IC 577, A 1939 Bom 198). For method of assessment of damages, see *Hormus* v. *Ardeshar*, 6 IC 571; *Sallay* v. *S B.Neogi & Co.*, 10 R 85, 137 IC 202, A 1932 Rang 56; *Kamlapat* v. *Bhukabai*, 188 IC 462). Exemplary or penal damages cannot be awarded (*Upper Sindh Cigarette Manufacturing Co.* v. *Peninsulur Tobacco Co.*, A 1941 Lah 293, 196 IC 19). Where the plaintiff's mark is itself fraudulent he is not entitled to sue (*Daulat Ram* v. *Veramal*, A 1938 Lah 803). A suit for declaration that plaintiff did not infringe defendant's trade mark does not lie (*Mohammad Abdul Kadar* v. *Finlay*, 6 R 291, A 1928 Rang 256, 111 IC 136; see also, *Madura Coats Ltd.* v. *Chetan Dev*, A 1985 P & H 43-on section 120 of the Act).

Where a particular name has become associated with goods manufactured or sold by the plaintiff, he is entitled to the protection of its name against persons who use that name on goods which are so similar to that of the plaintiff that the purchaser might infer a common origin (*Dhan Lakhmi Weaving Works* v. *Mahomed Abdul Aziz*, (1941) 2 MLJ 435; *Victory Transport Co.* v. *The District Judge, Ghaziabad*, A 1981 All 421).

If an ignorant or unwary purchaser is likely to be misled by the name or description or appearance of the infringing article mark or name, that would be a sufficient ground of action and would justify the issue of an injunction (*Mangalore Ganesh Beedi Works* v. *Free India Works*, A 1951 Mys 29; *S.P.S. Selvaraj* v. *Edward Nadar*, (1977) 2 MLJ 441). The question of resemblance between two trade marks and the likelihood of deception are to be considered by reference not only to the whole mark but also to the distinguishing or essential feature, if any, of a trade mark (*James Chadwick & Bros. Ltd.* v. *National Sewing Thread Co. Ltd.*, A 1951 Bom 147). When the colour, scheme and design which the defendant has been using is identical with the colour, scheme and design which the plaintiff has registered as his trade mark, it is a case of infringement of trade mark (*Corn Products*

by the public under that name. No other hair oil is designed or known by the said name.

2. The defendant is a perfumer carrying on business at Chowk, Allahabad.

3. The defendant has wrongfully sold and passed [*or*, is selling and passing off] hair oil not of the plaintiff's manufacture as and for the plaintiff hair oil. He sells and passes off his oil under the name of "Gulbahar Hair Oil" and this misleads the public into the belief that it is the plaintiffs' hair oil and thereby causes injury both to the public and to the plaintiff.

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v. *Shangrilla Food Products*, A 1960 SC 142 ["Glucovita" and "Gluvita"]; *K.R. Chinna Krishna Chettiar* v. *Sri Ambal & Co.*, A 1970 SC 146 ["Ambal" and "Andal"]).

There is a real distinction between an infringement action and a passing off action. The main question in a passing off case is whether goods have been passed off as those of another. In substance it is an action for deceipt. Action for infringement is statutory remedy conferred on the registered proprietor for the indication of his exclusive right to the use of the trade mark in relation to those goods. The essential features of both actions might coincide where the passing off is merely by use of colourable imitation of the trademark. But while mere imitation of registered trade mark is sufficient for an action for infringement it may be a good defence in an action for passing off that not withstanding appropriation of certain essential features of the registered trade mark the goods are sufficientiy distinguished from those of the plaintiff (*Pandit Durgadutt* v. *Navratna Pharmaceutical Laboratories*, A 1965 SC 980; *M. Damodara Pai* v. *C.K. Manilal*, 1972 Ker LJ 19; *Khem Raj Shri Krishna Das* v. *Garg & Co.*, A 1975 Delhi 130; *Moideen* v. *Vasu*, 1980 KLT 325).

The considerations relevant in a passing off action are somewhat different than on an application made by registration of a mark under the Trade-Marks Act and that being so the decision of court in a passing off action cannot be considered as relevant on the question that the Registrar has to decide under the provisions of section 8 (*The National Sewing Thread Co. Ltd* v. *James Chadwick & Bros. Ltd.*, A 1953 SC 357, 1953 SCJ 509). All proceedings in connection with the registration of trade marks are to be taken before the Registrar of Trade Marks. The powers and duties of the Registrar in that connection and the procedure to be followed are laid down in the Act.

Under section 105 of the Act, suits for infringement of a registered trade mark or relating to any right in such mark and passing off actions are to be instituted in the District Court having jurisdiction. In such suits the reliefs that can be claimed include injunction and at the option of the plaintiff either damages or an account of the profits together with or without any order for the delivery of the infringing labels and marks for destruction or erasure. In suits relating to infringements, damages other than nominal damages or an account of profits cannot be allowed

4. Particulars of such wrongful sale and passing off are as follows: *(give particulars).*

5. The hair oil sold by the defendant is of inferior quality and the sale of it as plaintiff's hair oil has already caused and will cause a great loss of reputation and consequent damage to the plaintiffs.

6. The defendant intends to sell as "Gulbahar Hair Oil", oil not in fact the plaintiffs' manufacture and to pass off as hair oil manufactured by the plaintiffs which is not in fact manufactured by the plaintiffs.

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where (a) in a suit for infringement of a trade mark, the infringement complained of is in relation to a certification Trade Mark, or (b) where in a suit for infringement the defendant satisfies the court (i) that at the time he commenced to use the trade mark complained of he was unaware and had no reasonable ground for believing that the trade mark of the plaintiff was on the register or that the plaintiff was a registered user using by way of permitted use and (ii) that when he became aware of the existence and nature and the plaintiff's right in the trade mark, he forthwith ceased to use the trade mark in relation to goods in respect of which it was registered.

In a passing off action there are broadly two tests which have to be applied for determining whether plaintiff is entitled to injunction. The first is whether the words used in the trade name of plaintiff have come to acquire a distinctive or secondary meaning in connection with plaintiff's business so that the use of that trade name adopted by another was likely to deceive the public. The second is whether there is a reasonable probability that the use of the name adopted by the defendants was likely to mislead the customers of plaintiff by reason of similarity of the trade names (*Victory Transport Co. Pvt. Ltd.* v. *The District Judge, Ghaziabad*, A 1981 All 421).

It should be noted that a passing off action lies even in respect of trade marks which are not registered (*Durga Dutt Sharma* v. *Navaratna Pharmaceutical Laboratories*, A 1962 Ker 156). An infringement action lies only in respect of registered trade marks.

Proceedings for infringement can be started not only by the proprietor of the trade mark but also in case of his refusal by the registered user of the trade mark. In such cases the proprietor must be made a defendant proforma. In suits for infringement, where the registration or the validity of the plaintiff's trade mark is questioned the issue has to be decided not in the suit itself but by an application for rectification of the register made in the High Court. The High Court and the Registrar have concurrent jurisdiction for entertaining applications for removal of a trade mark from the register, imposition of limitations on the ground of non-user, defensive registration of trade marks and rectification and correction of the register of trade marks but the Registrar can refer such applications to the High Court at any stage of the proceedings. On grant of temporary injunction, see *Manoj Plastic* v. *Bhola Plastic*, A 1984 Del 441; *Tobu Enterprises* v. *Joginder Metal Works*, A 1985 Del 244.

The plaintiffs claim (i) an injunction restraining the defendant by himself or by his agents from selling or offering for sale as "Gulbahar Hair Oil" not of the plaintiffs' manufacture, (ii) Rs. 20,000 as damages or in the alternative an account of profits and payment of the amount shown to be due to the plaintiffs on the taking of such account.

Appeals against an order or decision of the Registrar lies to the High Court and appeals.

Defence: The defendant may question the registration of the trade mark or its validity, the plaintiff's right of suit and contend that the action complained of falls under section 30 and does not amount to an infringement. He may also plead determination of the right in the said mark, but particulars as to how the right had determined must be given, e.g., that it was not renewed after seven years or that it was abandoned. He can also pray for stay of the suit pending rectification, under section 111 of the Act (*Elofix Industries* v. *Steel Bird Industries*, A 1985 Del 258). Acquiescence is one of the defences available under section 30(1)(b) of the Act. If the plaintiff stood by knowingly and let the defendants build up an important trade until it had become necessary to crush it, then the plaintiffs would be stopped by their acquiescence. If the acquiescence in the infringement amounts to consent, it will be a complete defence. The acquiescence must be such as to lead to the inference of a licence sufficient to create a new right in the defendant. (*Power Cantrol Appliances* v. *Sumeet Machines Pvt. Ltd.*, (1994) 2 SCC 448).

Dissimilarity of rival marks is not a complete defence, if the resemblance is sufficient to mislead an incautious purchaser (*Steel Bros.* v. *Ahmad Ibrahim*, 99 IC 723, 4 R 410). It is no defence that the defendant made special effort to guard against deception (*Lotus Ltd.* v. *Mt. Nassaba*, A 1934 Cal 600, 151 IC 5, 38 CWN 265; *Khem Raj Shri Krishnadas* v. *Garg & Co.*, A 1975 Delhi 130). Mere delay is no defence to injunction (*Abdul Karim* v. *Abdul Karim*, A 1931 Mad 461, 132 IC 650, 1931 MWN 311; *Devidas* v. *Alathur*, 1940 MWN 1157, (1940) 2 MLJ 793). In a passing off action the defendant can escape from liability by showing that his goods distinctly indicate that they do not originate from plaintiff, although they are similar to plaintiff's goods (*Khem Raj Shri Krishnadas* v. *Garg & Co.*, A 1975 Delhi 130).

Delay in making the application for rectifications of the register under Chap. VII of the Trade Marks Act is not *per se* a valid ground for defence (*Abinash Chandra* v. *Madhusudan*, 6 DLR Cal 138).

Limitation is three years under Article 88 (formerly Article 40) (*C.G. Varcados* v. *D.C. Mc. Leod*, 51 IC 434). This is continuing wrong and section 22 may be of help.

TRESPASS TO GOODS *(ee)*

No. 230—Suit for injury to Animal

1. On June 4, 1995, the defendant shot and killed a horse belonging to the plaintiff while the said horse was grazing in the plaintiff's field in village Rampur, pargana and tahsil Rupar, district Ambala.

2. The said horse was worth Rs.1,600 and the plaintiff has suffered damage to that extent.

The plaintiff claims Rs.1,600 as damages with interest from date of suit to that of payment.

No. 231—Suit for Damages for Cutting and Taking Away Trees

1. The plaintiff was the owner of 10 *Babul*, 5 *Nim* and 10 *Shisham* trees as detailed below.

2. On July 10 and 11, 1995, the defendant cut down without the plaintiff's consent, the said trees, and appropriated the wood thereof (*or, on* July 10, 1995 defendant No.1 wrongfully sold the said trees to defendant No.2 for Rs.75,000 and the latter has cut down the said trees).

3. The trees were worth Rs.75,000.

The plaintiff claims Rs.75,000 as damages, with interest from the date of suit to that of payment.

Details of Trees

* * * *

(ee) In this category are included suits for injury to goods or animals, e.g., theft, misappropriation, mischief, or breach of trust in respect of goods. **The plaintiff must allege that he was in actual** possesion of the goods (and in that case, he need not show title so long as the defendant cannot claim a better title than his own), or that **he had legal right to immediate possession. Next the act of the defendant amounting to trespass must be alleged with necessary particulars** but without unnecessary details.

It is not necessary that the person in possession must be owner of the property, he may be a hirer or a bailee or pawnee or a carrier. He can even bring a suit against the owner for wrongfully taking away the goods, and recover damages in respect of his limited interest but in such case, when **the suit is against the owner, the plaintiff must allege, not only his possession, but the limited right under which he was in possession.** In some cases persons having a right of possession though

No. 232—Suit for Cutting Away Plaintiff's Crops

1. The plaintiff was owner, and in possession of the sugarcane crop growing on plots Nos. 102, 103 and 104 in village Rupa, pargana and tahsil Sadabad, district Mathura.

2. On November 15, 1995, the defendant, wrongfully and without the plaintiff's consent, cut away and appropriated the said crop from the said plots.

3. The plaintiff has thereby suffered damage.

Particulars of Damages

	Rs.
Estimated out turn of the said crops	9,000
Less expenses by defendant	2,000
Net Loss	7,000

The plaintiff claims Rs. 7,000 with interest from date of suit to that of payment.

No. 233—Suit for Movables Appropriated by the Defendant

1. One Rahim Baksh was, at the time of his death, owner of the movable property entered in the Schedule appended to the plaint and to be treated as part hereof.

2. The said Rahim Baksh died on November 4, 1980. He left no widow, sister, parents, or grand-parents or any issue except the plaintiff. The plaintiff is his only son. The defendant was the kept mistress of the said Rahim Baksh.

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not in possession can also sue, such as a bailor (*Kanhya Lal* v. *Badri Lal*, A 1965 Raj 121).

The plaintiff can, against a wrong doer, claim as damage, the value of the property if the same has been lost, plus such other damages as he might have suffered from being deprived of it. If the property is only partially injured, he must claim damages for such injury, describing the injury. The damage must be calculated according to the value of the property on the date of the wrong and not on any subsequent date (*Rogers* v. *John King & Co.*, A 1926 Cal 564, 53 C 239). If the property is still in possession of the defendant and can be recovered from him, the plaintiff may bring a suit for its recovery, and for damage suffered by its temporary loss. But specific movable property cannot be recovered unless the case falls under

3. At the time of the death of the said Rahim Baksh, the defendant took into her possession the said property and has retained it since and deprived the plaintiff of its use.

4. The plaintiff has thereby suffered damage.

Particulars

	Rs.
Value of the property as given in the said Schedule.	10.000
Loss of Profit which the plaintiff would have made by the use of 12 cows and 2 she-buffaloes for 1 month at Rs. 50 per day	1.500

The plaintiff claims :

(*a*) Return of the said property by the defendant, and Rs.1,500 as damages.

(*b*) In the alternative, Rs.11,500 as damages.

Schedule of Property

* * * * *

No. 234—Suit for Damages caused by Theft

1. On October 20, 1995, the defendant broke into and entered the plaintiff's shop and seized and wrongfully carried away therefrom, a Singer Sewing Machine, and two Bajaj electric iron belonging to the plaintiff.

2. By reason of the said wrongful act of the defendant, the plaintiff has been, and is, deprived of the use of the said articles, and prevented

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section 7 or section 8 of the Specific Relief Act, 1963, and in all other cases only damages can be recovered. But even when the suit is for specific movables, the plaintiff must claim in the plaint a specified sum in the alternative, in case the property cannot be found. In that case if the court passes a decree for money in the alternative, the decree can be executed as if it were a money decree, but the procedure of O. 21, R. 31 should be followed (*Balmukunda* v. *B.N.Ry.* 103 IC 740, 31 CWN 850).

Limitation : The limitation is usually three years under Article 68 or 91 but the time from which it runs is different under each Article. If the plaintiff has lost the goods or the same have been taken away from him by theft, dishonest misappropriation or conversion, time for a suit for recovery of the specific goods or for compensation for wrongfully detaining the same would run from the date when

from carrying on his business as a tailor and deprived of the profits he would have otherwise made.

Particulars of Damage

	Rs.
Value of the Singer Sewing Machine	2300
Value of the two irons	300
Loss of business for 20 days at Rs. 30 per day ...	600

The plaintiff claims :

(1) Recovery of the said sewing and ironing machines or Rs. 2,600 on account of their value.

(2) Rs. 600 as damages.

TRESPASS ON LANDS *(ff)*

No. 235—Suit for Possession against a Trespasser

1. The plaintiff was, on November 5, 1995, and still is, owner of the house bounded as follows and situate in *mohalla* Alamnager, Lucknow, and had been in possession of it up to the said date :

Boundaries of the House

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the plaintiff learns in whose possession the property is. Time for a similar suit in respect of any other property, and for one injuring goods runs from the date when the property is wrongfully taken or injured or when the detainer's possession becomes unlawful.

Defence : In such cases, the defendant may plead self-defence, e.g., in shooting a dog attacking the defendant or his rabbits, or an inevitable accident, e.g., in the shooting off of a gun. He may plead some lawful excuse, e.g., a right to distrain the crop, etc., or may plead legal authority under a warrant or process or a right to cut trees under some custom. He can deny the plaintiff's title to property and plead a paramount title in himself, but, if the plaintiff was in possession, the defendant cannot plead title in a third person. If the defendant has lawfully obtained possession of the property of the plaintiff and is sued for refusing to deliver it back, he may plead that he has a lien on it for his charges, e.g., a tailor having a lien for his wages.

(ff) Trespass may be committed either by wrongfully entering upon the land of the plaintiff, or, having entered upon it lawfully, but, remaining on it without the plaintiff's consent and against his will, or by doing any act affecting the sole

2. On the said date, the defendant wrongfully broke open the lock and entered into possession, and has since then been retaining possession, of the said house, without the plaintiff's consent.

3. The letting value of the said house is Rs.2,000 per month.

4. By reason of the trespass, the plaintiff has suffered damage.

The plaintiff claims :

(1) Possession of the said house.

(2) Loss already suffered between November 5, 1995 and November 10, 1995 (*the date of the suit*) at Rs.2,000 a month, Rs.400.

(3) Continuing damages at the aforesaid rate of Rs.200 per month until delivery of possession to the plaintiff.

No. 236—Suit for Possession under Section 6 Specific Relief Act

1. The plaintiff was, up to November 21, 1995, in possession of the property detailed below.

Description of immovable property

* * *

2. On November 21, 1995, the defendant dispossessed the plaintiff of the said property, without the plaintiff's consent and otherwise than in due course of law.

The plaintiff claims recovery of possession of the said property.

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possession of the plaintiff, e.g., by storing bricks on the land or by driving pegs in the plaintiff's wall or by opening niches or almirahs in it, or by constructing a balcony overhanging the plaintiff's land. If a person having a limited right of entry exceeds the right, he is a trespasser. A person who is in possession under a void lease is also a trespasser and can be ejected as such (*Bank of Upper India* v. *Harnath*, 93 IC 852). Where government has acted in a purported exercise of statutory power, such suit would not lie unless its act is not only *ultra vires* but also otherwise than in good faith (*Latino Andre Henriques* v. *Union Government*, A 1968 Goa 132; *State of Bihar* v. *Bishnu Chand*, (1985) 1 SCC 449). A person who unlawfully interferes with the exercise of property right of others, commits trespass and is liable for damages without proof of malice or want of reasonable or probable cause unless the act of interference is under judicial sanction, when malice and want of reasonable and probable cause will have to be proved (*Ram Narayan* v. *Bholanath Das*, 81 CWN 518). If the only trespass consists in the doing of an act injuriously

No. 237—For Possession on the Grounds of Possessory Title

1. The plaintiff is a resident of village Namkoli, pargana Barla, district Aligarh, and had, up to the date hereinafter mentioned, been in possession of plot No. 272 in the *abadi* of the said village by keeping his cattle and fodder on it for over 50 years.

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affecting the property, a suit for damages would be sufficient. In such cases, the practice of praying for a mandatory injunction to compel the defendant to right the wrong he has committed, e.g., to fill up the niches or to remove the pegs, etc., is not always right (*Ewin* v. *L. Po.*, 104 IC 139, 5 R 404). If the plaintiff can himself remedy the wrong, he may only claim cost of doing so as his damages, in addition to any other damages. If, however, the plaintiff cannot do so because the doing of it involves the plaintiff's going on the defendant's land, a suit for a mandatory injunction is proper. For instance, if the defendant whose house is behind that of the plaintiff makes any niches on his side of the wall belonging to the plaintiff, the plaintiff must claim a mandatory injunction against the defendant to close the niches. Similar relief may be claimed in respect of constructions made by the defendant on joint land. The fact that a question of title may have to be incidentally gone into in determining the plaintiff's right to injunction is no objection to the maintainability of such a suit (*Veerappa* v. *Arunachalam*, 160 IC 993, A 1936 Mad 200). It is well-settled that where a person is in settled possession of the property, even on the assumption that he has no right to remain on the property, he cannot be dispossessed by the owner of the property except by recourse of law (*Krishna Ram Mahale (Dead)* v. *Shobha Venkat Rao*, A 1989 SC 2097, 1989 BCR (3) 364; *Lallu Yeshwant Singh* v. *Rao Jagdish Singh*, A 1968 SC 620).

Possessory Title : As against a person who has taken possession of the plaintiff's land, or who, having obtained possession under a right, does not leave it on the determination of the right, the only suit will be for possession and mesne profits. In such cases money compensation is not adequate (*Babu* v. *Mohd. Yamin*, 1995 (1) ARC 373 All; *Dip Narain* v. *Jagmohan*, 87 IC 15, A 1925 All 576). The fact that the trespasser has erected buildings on the land will not necessitate a suit for a mandatory injunction against the defendant to pull down the building. The suit will be one for possession, though the defendant may be allowed to take away his materials (*Narayan* v. *Lakshmanrao*, 25 IC 286).

The suit on the basis of possession may be brought either within six months of dispossession under section 6, Specific Relief Act, or within 12 years as regular suit. Where the person dispossessed has title to the property, he has the option to bring a suit either under Sec.6 of the Specific Relief Act or under the general law, based on title (*Chandrabhan Prasad* v. *Mohanlal*, A 1987 Cal 323). The former suit is based essentially on plaintiff's previous possession and subsequent dispossession and the question of title of either party does not arise. Plaintiff must be restored the possession, whether he has or has not any right to remain in

2. On December 4, 1959, the defendant, wrongfully and without the plaintiff's consent, dispossessed the plaintiff and has entered into possession of the said land, and is still in possession.

The plaintiff claims to recover possession of the said land.

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possession and whether the defendant has or has not a right to eject him. Such suits can be instituted on half the ordinary court-fee, and are very useful when the position is such that the plaintiff cannot succeed in a title suit, and, if he is restored to possession, the defendant can eject him by a title suit. The suit filed against those who are in actual possession for recovery of the immovable property under Sec. 6 of the Specific Relief Act can be effectively decided even in the absence of the agents who have dispossessed plaintiff and transmitted the possession to the defendants (*Dibgar Arvindkumar Keshavlal* v. *Shri Modh Ghamel Guyati Samraj*, A 1995 Guj 148, 1995 (1) Guj R 864 (Guj). In a suit under section 6 of the Specific Relief Act for the recovery of possession, questions relating to right, title and interest of a party are not to be decided, the court has to decide only whether the plaintiff was in possession of the property and has been dispossessed otherwise than in due course of law within six months prior to the date of filing of the suit (*Md. Nurul Islam* v. *Md. Julup Raja*, 1995 ALHC 2164 Gauh). Where in a suit for declaration of title, the alternative relief of possession is not claimed, the suit is not barred by the proviso to section 34 of the Specific Relief Act (*Kalyan Singh* v. *Vakil Singh*, A 1990 MP 295). No appeal lies against a decree passed in a suit under section 6 of the Specific Relief Act (*Hawabai* v. *Abdul Sattar*, 1995 ALHC 3062 Bom).

The only points that are necessary to be alleged in such a suit are, (1) that plaintiff was in possession, (2) that he has been dispossessed by the defendant within six months of the suit, (3) that he has been dispossessed without the plaintiff's consent and otherwise than in due course of law (*Kalulal* v. *Mannalal*, A 1976 Raj 108). A landlord who has put a tenant in actual possession cannot bring a suit under section 9 of the Specific Relief Act 1877 (now section 6 of the Act of 1963) against a person dispossessing the tenant (*Sita Ram* v. *Ramlal*, 18 A 440; *Veeraswami* v. *Venkatachala*, 92 IC 20, 50 MLJ 102, A 1926 Mad 18; *Goma* v. *Narsinghrao*, 20 B 260). The Calcutta and Madhya Pradesh High Courts have, however, taken a different view (*Nrittolal Mitter* v. *Rajendra Narain*, 22 Cal 562; *Nandlal Pd.* v. *Raghunath*, 1963 MPLJ Notes 87). But a mortgagee in possession through a tenant can (*Rathanasabapathi* v. *Ramaswami*, 33 M 452, 20 MLJ 301). At any event, a landlord can bring a suit with tenant as co-plaintiff (*Bhojraj* v. *Shesrao*, A 1949 Nag 126), or *pro forma* defendant (*Ratan Lal* v. *Amar Sing*, 53 B 773, A 1929 Bom 467, 31 BLR 1042 DB). A suit under section 6 can be brought even by a person who was in joint possession with another, but has been dispossessed by the latter (*Ajiman* v. *Raisat*, 19 CWN 1117, 28 IC 520), and in such a case a decree for joint possession can be passed (*Ballabh Das* v. *Gurdas*, A 1940 All 225, 189 IC 92). Even a tenant by sufferance has juridical possession and if dispossessed by

No. 238—Suit by One Co-Sharer against Another

1. The plaintiff and defendant are joint owners of plot No. 102 in the *abadi* of village Rampur, pargana Malihabad, district Lucknow, which has, up to the date hereinafter mentioned, been used by the parties as a threshing ground.

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landlord without recourse to court, he can sue for possession under section 6 (*Migilipuvvu* v. *Malamapaty Narsingha Rao*, (1982) 2 An WR 1). Deprivation of symbolic possession may also justify a suit under section 6 (*Kumar Kalyan Prasad* v. *Kulanand*, A 1985 Pat. 374: case law discussed). Such a suit cannot, however, be brought against the government. A decree in a suit under section 6 is final and not open to appeal nor normally to revision (*Sobhabati* v. *Lakshmichand*, A 1984 Ori 171), the remedy of the defeated party being by a regular title suit.

A person who is put in possession by a Magistrate under section 145 Cr. P.C. cannot be sued under section 6 (*Azimuddin* v. *Alauddin*, 43 IC 193, 22 CWN 931). A suit for *mesne profits* cannot be joined with a suit under section 6 (*Thavasi* v. *Arumagam*, 28 IC 1; *Tilak Chandra* v. *Fatik Chandra*, 25 C 803; *Nazir Ahmad* v. *Abid Ali*, 8 ALJ 910, 11 IC 387; *Adul Kadi* v. *Uthumansa*, 102 IC 661), nor can an order for removal of structures be claimed in such suit (*Sona* v. *Prakash*, A 1940 Cal 464). A suit under Sec. 6 of the Specific Relief Act by a licensee against the licensor is maintainable and a receiver can be appointed (*Meghji Jetha* v. *Kalyanji Nanji*, (1988) BCR 263 Bom).

A regular suit may be based on plaintiff's title in which case his previous possession is immaterial except for the purpose of limitation or it may be based on previous possession. Even if a suit is based on title court may give decree on the ground of previous possession (*Karuppanan* v. *Sundara Raja*, A 1940 Mad 71). A suit under section 6 is maintainable in the Civil Court even in respect of agricultural land as such a suit does not lie in the revenue court (*Maya Ram* v. *Gopal*, 1961 RLW 636; *Yar Mohd.* v. *Laxmidas*, A 1959 All 1).

A plaintiff can succeed merely on the basis of his previous possession, even though he has no valid title, against a person who has no title better than his (*Krishnarao* v. *Vasudeo*, 8 B 371; *Ma Pwa Zon* v. *Ma Pon*, 102 IC 696, 5 R 154; *Shiv Saran Rai* v. *Sukhdeo Rai*, A 1937 Pat 418, 171 IC 371; *Sohan Lal* v. *Sheikh Mohammad Hussian*, A 1930 Oudh 374; *Gajraj Puri* v. *Raja Kam*, 1937 AWR 1140, 1937 ALJ 1189; *Ramanlal* v. *Bhaiya*, A 1937 Nag 281; *Panchvati Ram Chandra* v. *Satybhama Devi*, 1971 AWR 135). A possessory title is good against the whole world except the real owner. *Nair Services Society Ltd.* v. *K.C. Alexander*, A 1968 SC 1165; *Damyanthi* v. *Theyyan*, 1979 KLT 85 where the rationale underlying the principle has been fully explained). Where a person is in settled possession of the property, he cannot be forcibly evicted even by the true owner except by due course to law (*Krishna Ram Mahale (Dead)* v. *Mrs. Shoba Venkata Rao*, A 1989 SC 2097; 1989 (3) Bom Cr 364 (SC); *C. Bhaskar* v. *State of Karnataka*, 1995 All H.C. 3228 (Kant) (DB).

2. On January 2, 1996, the defendant commenced to build a house on the said plot, without the plaintiff's consent, and has constructed walls to the height of two feet. Notwithstanding a duly registered notice sent to him by the plaintiff by post requiring him to cease building and to remove the said constructions, the defendant is continuing to erect the same and

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The possessory title can be transferred even after dispossession of the transferor (*Jan Mohd.* v. *Habib*, A 1943 Oudh 330). The widow whose possession in lieu of dower was lost would succeed even against heirs in a suit u/s 6. Suit on possessory title can be filed even after failure in a suit u/s 6 (*Bambali Kuppum* v. *Padamnabba*, A 1945 Mad 245; *Nair Service Society* v. *K.C. Alexander*, A 1968 SC 1165). Plaintiff can recover possession from a trespasser on the basis of possessory title even though section 6 of Specific Relief Act may not be applicable (*Atra Devi* v. *Ram Sarup*, A 1972 Patna 186).

The plaint should therefore clearly show the right on which it is based. Next to the title of the plaintiff, should be alleged the dispossession by the defendant, or plaintiff's discontinuance of possession if the suit is on that ground. If it is on the ground of plaintiff's paramount title, the fact that the defendant is in possession should be alleged. Where there is no allegation of plaintiff's dispossession by the defendant, a suit under section 6 of Specific Relief Act, does not lie (*Nagar Palika, Jind* v. *Jagat Singh*, 1995 SC 1377).

The suit for possession may be brought by anyone who is affected by the wrong, but a person to whom a licence to build upon land has been granted can not bring a suit against one already in wrongful possession (*Manbahal* v. *Ram Ghulam*, 103 IC 43 All). But a licensee who is in possession and has some interest in land, e.g., has put cattle trough, etc., on it can sue for possession, if dispossessed (*Pannalal* v. *Anant*, A 1946 All 284; *Mahadev* v. *Palakdhari*, A 1960 All 743).

Limitation : Under the Act of 1963, all suits for possession have been divided in two categories, *viz.*, suits based on title and suits not based on title. For all suits for possession based on title Article 65 applies in which the limitation is 12 year, and starts from the date when the possession of the defendant becomes adverse to the plaintiff. If the suit is not based on title but is based on previous possession and dispossession it will be governed by Article 64, and the Limitation of 12 years will start from the date of dispossession. Suit based on what is known as possessory title is really a suit based on previous possession and not on title and will, therefore, be governed by Article 64.

Joint Owners : One of the several co-sharer in a property can eject a trespasser (*Sri Thakurji* v. *Hiralal*, 20 ALJ 609, 44 A 634; *Syed Ahmed* v. *The Magnesite Syndicate Ltd.*, 39 M 501, 29 IC 60, 28 MLJ 598; *Govind* v. *Kasmirao*, 102 IC 195; *Moti Lal* v. *Basantlal*, A 1956 All 175; *Chiranjilal* v. *Khatoon Bi*, A 1995 MP 238; *Gouri Shankar Misra* v. *Kali Prasad Guru*, (1970) 1 CWR 325), but the decree obtained would be on behalf of all co-sharers and for the benefit of all (*Qader Rashid* v. *Khaliq*, 1972 Kash LJ 59) even if such a trespasser is in possession

thereby threatens and intends, unless restrained from so doing, to complete the said house.

3. The said constructions will interfere with the plaintiff's rightful enjoyment of the said land as threshing ground.

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under a lease from one of the joint co-sharers. In such cases, the other co-sharers are generally made defendants and a decree should be claimed by the plaintiff for himself and on behalf of his co-owners (*Sheodial* v. *Parbati*, 22 IC 841, 12 ALJ 23; *Ahmed Hussain* v. *Uma Devi Shukla*, A 1975 All 254). The right of other co-sharers is only to get the land partitioned (*Gajadhar* v. *Bhikari*, 18 CWN 1011, 27 IC 228; *Bikarani* v. *Rajagopal*, 70 CLJ 199). When the majority of co-sharers have allowed a third person to build on joint land, others cannot have the building demolished (*Amar Singh* v. *Jamal*, 8 LLJ 313, 94 IC 995 Lah).

Suit instituted by some of the co-owners for eviction of a trespasser is maintainable even without impleading all the co-owners (*Shivaji* v. *Hiralal*, 1985 MPLJ 10; *Chiranjilal* v. *Khatoon Bibi*, A 1995 MP 238).

One co-owner cannot appropriate any part of the joint land to his own exclusive use by building upon it, nor can he build on a joint party wall (*Ikramulla* v. *Muhammad Yunis*, 30 IC 33, 13 ALJ 473). The plaintiff may, in such cases, sue for injunction to restrain the defendant from doing such act, or for removal of such act of trespass, if already completed, but such a suit must be brought with promptitude, otherwise unexplained delay may be taken as acquiescence. Unless the partition is effected no co-owner can lay claim to the plot exclusively. The co-owners have equal rights and they can prevent the user of the joint property by some of the co-owners only unless there is a partition or family settlement permitting those co-owners to have exclusive possession on a particular property (*Narsingh Narain Misra* v. *Chairman/District Magistrate Basti*, 1994 ALJ 971 All; see also *Prabhoo* v. *Doodh Nath*, A 1958 All 178).

Demolition being discretionary relief the court must adjudge the balance of convenience (*Chhedilal* v.*Chhoteylal*, A 1951 All 196 FB); hence a co-owner, cannot have a building erected by another co-owner, demolished without proof of special injury to himself (*Annanda* v. *Parbati*, 3 CLJ 198; *Sachendra Nath Sarkar* v. *Binapani Basu*, 80 CWN 289). A construction even a temporary one, if found to be a step towards an exclusive use of the land, can in a suitable case be demolished, but not one (*like a cattle trough*) which is not of such a character (*Shankar Lal* v. *Pati Ram*, 168 IC 650, A 1937 All 293). **The plaint should allege joint title in the property, and facts showing an invasion of such joint right, and further, according to Calcutta view, injury to the plaintiff.** If there has actually been an injury, it should, in any case be alleged, as after all injunction being a discretionary relief, the injury will be an additional ground for granting it. If the co-owner who erects a building has been in exclusive possession of the land, the building will be maintained if it is in keeping with the purpose for which he has been exclusively using the land, but not otherwise, e.g., one using land as a cattle trough cannot build a sitting room

The plaintiff claims :

(1) An order to the defendant to demolish the constructions made by him.

(2) Joint possession on the land occupied by the construction.

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on it (*Sheo Harakh* v. *Jai Govind*, 104 IC 414 All).

Co-owners are legally competent to make any arrangement for the enjoyment of the common property including an agreement that one will pay compensation to the other or that one of them will enter into possession as a lessee (*Thomas* v. *Radha Kumar Debi*, 1975 KLT 475). If co-owners are, by mutual consent or by private arrangement, in possession of separate portions of the joint property, anyone dispossessed by the other can sue for the latter's ejectment (*Kuldip* v. *Jagnandan*, A 1923 All 363 DB; *Jaganath* v. *Badri*, 34 A 113, 9 ALJ 48, 11 IC 768; *Durga* v. *Khunkur*, 27 CLJ 441, 45 IC 705; *Hardeo* v. *Chandka*, 52 IC 7, 6 OLJ 278). If one co-owner is in peaceful possession without any ouster or exclusion of others, he is under no obligation to render accounts or to pay compensation even if he is in possession of more than his share of land (*Chandra* v. *Bishesar*, 32 CWN 291; *Mst. Vidya Bai* v. *Narayandas*, 1971 MPLJ 925).

The rights and labilities of co-sharers *inter se* and what amounts to ouster has been dealt with at some length in *Sant Ram Nagina Ram* v. *Daya Ram*, A 1961 Punj 528; *Sinnaraj Pillai* v. *Ramayee Ammal*, A 1969 Mad 96 and *Mst. Vidya Bai* v. *Narayandas*, 1971 MPLJ 925.

In such cases he must plead in the plaint either an express arrangement or facts from which mutual consent could be implied e.g., long exclusive possession without hindrance (*Jalaluddin* v. *Rampal*, 4 OWN 871, 2 Luck 740). However long the possession of a co-owner of joint land may be, it cannot confer on him any right adverse to the other co-owners unless it is a case of ouster (*Maharajadhi Raja of Burdwan* v. *Subod Chand Bose*, A 1971 SC 376; *Shambhu Prasad Singh* v. *Mst. Phool Kumari*, A 1971 SC 1337).

Parties : One of the several co-owners can sue to eject a trespasser; but all persons in joint possession as trespassers must be joined as defendants (vide Chap XI). A servant or wife or relative of the trespasser cannot be sued without impleading the latter as even a wrongful possession implies more than physical possession of a person (*Shivalinga* v. *Kumodinei*, A 1930 All 224).

Defence : A defendant may justify a temporary trespass on the plaintiff's land by (1) an easement acquired by him, (2) a licence or permission of the plaintiff himself or of any person who had authority to give it, (3) self-defence or defence of goods or animals, (4) acts of necessity, e.g., to abate a nuisance or to put out fire, (5) authority of law, e.g., execution of legal process. In a suit on the ground of dispossession, the defendant may plead that the dispossession took place more than 12 years before the suit or that he has a better title than the plaintiff. In every case of possession on the ground of title, the defendant may allege that he has become owner by adverse possession for over 12 years, but there can be no title by

(3) A permanent injunction to restrain the defendant from making any construction on the said land without the consent of the plaintiff.

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possession even for over 12 years unless the possession is shown to have been adverse. As against government title by prescription can be completed by 30 years' possession (Article 112). As against local authorities e.g., Municipal Board and District Board 30 years' adverse possession is needed to mature the title by prescription (Article 111). The construction of a temporary shed on waste land which is not of immediate use to the owner is not adverse possession (*Shah Nawaj* v. *Ghulam Shah*, 40 PLR 91, A 1938 Lah 324, 176 IC 930), nor can the mere use of such land by a neighbour in various ways which are convenient to him (*Kaladhari* v. *Jabachh*, 181 IC 275, A 1939 Pat 399). Adverse possession need not be to the knowledge of the owner (*Kuppuswami* v. *Kuppuswami*, A 1941 Mad 866; *Raghabar* v. *Balla*, A 1941 Nag 311; *Saroj* v. *Kumar*, 45 CWN 126).

If the defendant was a co-sharer with the plaintiff he cannot succeed on the plea of adverse possession merely on the proof of long possession but must show definite exclusion or ouster of the plaintiff as in law generally possession of one co-owner is possession of all (*Krishan* v. *Krishanoo*, A 1985 HP 103; *P. Lakshmi Reddi* v. *L. Lakshmi*, A 1957 SC 314; *Vishnu* v. *Mahadeo*, 43 BLR 971; *Khem Chand* v. *Dewa Ram*, 1941 Sindh 50, 194 IC 137; *Muhammad Amiruddin* v. *Mahammad Abdul*, A 1941 Nag 343, *Jwala* v. *Jagdish*, A 1941 Lah 144, 195 IC 244; *Kuldip Mahaton* v. *Bhulan Mahaton*, (1995) 2 SCC 421). Unless other co-parceners have been ousted, mere possession of one co-parcener is not adverse possession (*Sadasivam* v. *Doraisamy*, A 1996 SC 1724). Where possession could be referred to lawful title, it will not be considered to be adverse (*Annasaheb Bapusaheb Patil* v. *Balwant Bapusaheb Patil*, A 1995 SC 895, 1995 ACJ 19 (SC), 1995 (2) SCC 544; *R. Chandevarappa* v. *State of Karnataka*, (1995) 6 SCC 309).

The plea of adverse possession must be raised in clear words. It is immaterial that the date of commencement of adverse possession is not stated (*Sathruppa Naicker* v. *Ramasamy*, A 1996 Mad 290). A person whose possession is permissive cannot claim title on the basis of adverse possession (*Dr. Bhargava & Co.* v. *Shyam Sunder Seth*, A 1995 SC 377, 1995 (1) ARC 402 SC; *Thakur Krishna Singh* v. *Arvind Kumar*, A 1995 SC 73, (1994) 6 SCC 591). In every case, particulars of the defence set up should be given. A trespasser erecting costly building cannot claim a right to retain possession or to compel the plaintiff to receive compensation for the land (*Ganga Din* v. *Jagat*, 12 ALJ 1026).

In a suit against a co-owner the defendant may plead aquiescence of the plaintiff, or that the alleged trespass is only an enjoyment of the property by the defendant and not an infringement of the plaintiff's right, or that the land on which the alleged trespass is said to have been committed has been in long exclusive possession of the defendant by consent of the plaintiff. He can claim compensation for reconstructing the joint property, if he did it without protest from the plaintiff and not with a view to embarrass him at the time of partition or at an inordinate expense (*Radhey Shiam* v. *Mahammad Nasir*, 168 IC 472, A 1937 Oudh 394).

No. 239—Suit for Joint Possession *(gg)*

1. Khuda Baksh, the father of the parties, was owner of the property detailed at the foot of the plaint.

2. The said Khuda Baksh died in 1995, leaving the plaintiff, his daughter, and the defendant, his son, as his only heirs.

3. On the death of the said Khuda Baksh, the defendant took exclusive possession of the said property and has been in possession ever since.

The plaintiff claims joint possession of the said property to the extent of her legal one-third share.

No. 240—Suit against Alienee of a Joint Co-Sharer *(hh)*

1. The plaintiff and defendant Nos.3 to 8 are joint owners of the land specified at the foot of the plaint.

(gg) A person who is entitled to possession of a property jointly with the defendant is entitled to a decree for joint possession, unless it can be held on considerations of equity and good conscience that he has lost that right (*Srish Chandra* v. *Mathura*, 102 IC 148). O.21, R.35 (2) lays down how a decree for joint possession can be executed and, it is not necessary to put the plaintiff in actual possession under the decree. If a co-sharer in separate possession of *abadi* land, builds a house thereon or transfers it to a third person, the other co-sharers can sue for joint possession (*Mohammad Sher Khan* v. *Bharat Indu*, 25 ALJ 983, 106 IC 656). The other co-sharers need not be joint (*Kuchibhotla* v *Kuchibhotla*, 95 IC 856, A 1926 Mad 809). But when one co-sharer was in exclusive possession of joint land without any objection by other co-sharers without denying their title and he let to a third party an area smaller than what he would get on partition, the High Court refused to give joint possession of the land to other co-sharers (*Bibi Aimana* v. *Sarurannessa*, 32 CWN 449). One co-sharer cannot obtain exclusive possession of joint undivided property from another co-sharer. He can at the most have joint possession with the other co-sharer or a declaration of his specific share (*Hubai Mitter* v. *Hajibhai Abubai*, A 1950 Oudh 40).

The plaint should allege the plaintiff's title to the property and the defendant's possession of it. The date from which the defendant's possession is said to have become adverse must also be given, if such is the case.

If a decree for joint possession is not executed and joint possession (which may be symbolical) has not been obtained, the decree-holder cannot subsequently bring a suit for partition (*Sahjan* v. *Asanulla*, 101 IC 622, 31 CWN 406, A 1927 Cal 411, 54 C 554 DB).

(hh) The possession of the alienee in such cases becomes adverse to the other co-sharers as soon as he enters into possession and Article 144 of the old

2. The said land was in possession of one Ramjas as tenant of the plaintiff and defendant Nos.3 to 8 upto November 30, 1984 after which he relinquished it.

3. Defendant No.5 let the said land to defendants Nos.1 and 2 for 10 years and defendant Nos.1 and 2 took possession on January 15, 1985.

(*Or* 2. The said land is part of the joint *abadi* of village _____, and has been lying vacant.

3. Defendant No.5 sold the said land by a sale-deed dated July 20, 1986 to defendant Nos.1 and 2 who have erected a *kohlu* on it).

The plaintiff claims :

(1) Ejectment of defendant Nos.1 and 2 from the said land.

(2) Joint possession with defendant Nos.3 to 8.

III—PLAINTS IN OTHER SUITS

No. 241—Administration Suit *(a)*

(By a Creditor)

1. George Kellner, late of Allahabad, was, at the time of his death,

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Limitation Act was applied to such cases (*Ibrahim* v. *Ali Md.*, 116 IC 819). However, in some cases it has been held that possession of an alienee from a co-owner is adverse to other co-owners only when there is an ouster of other co-owners (*Ghulam Nabi* v. *Umar Bakht*, A 1941 Lah 307; *Mathure Sahu* v. *Sridhar Panda*, (1980) 49 CLT 539). Where a person purchases property held in common by several tenants in common from one of such tenants in disregard of the title of other co-tenants, possession of the latter becomes adverse to the purchaser from the date of his purchase (*Nizamuddin* v. *Mangal Sen*, A 1949 All 699). Transfer of specific plot by a co-sharer confers title in the property on the alienee to the extent of the share of that co-sharer alone (*Pal Singh* v. *Deputy Director of Consolidation U.P.*, 1970 AWR 895). Transfer of specific land by co-sharer in exclusive possession would remain subject to the right of other co-sharers on partition (*Tek Singh* v. *Juswan Singh*, A 1972 P &H 208). Possession of a stranger after purchasing the whole property from a co-owner is *prima facie* adverse, and if he satisfies that his possession was overt without any attempt at concealment and it was adequate in continuity, publicity and extent, he has to be given benefit of such possession as against other co-owners of his alienor (*Rajak Sarif* v. *Haji Syed Munsaraf Ali Chisti Bukhari*, (1972) 2 CWR 1608).

(a) Such a suit may be filed either by any creditor of the estate or by a legatee or heir of the deceased; but if the creditor is a decree holder his decree must be

and his estate still is, indebted to the plaintiff for the sum of Rs.4,000 and interest, due under a simple money bond executed by him in favour of the plaintiff on December 20, 1992.

2. The said George Kellner died intestate on March 24, 1994.

3. The defendant has obtained Letters of Administration of his estate, and has possessed himself of all the movable and immovable property of the deceased, but has not paid the plaintiff his debt.

The plaintiff claims that an account may be taken of the movable and immovable property of George Kellner deceased, and that the same may be administered under the decree of the court.

No. 242—Suit for Administration by Creditor on behalf of himself and all other Creditor's

(Form No. 41 Appendix A, C.P.C.)

1. *EF*, late of ____, was, at the time of his death, and his estate still is, indebted to the plaintiff in the sum of _____.

[*here insert nature of debt and security, if any*].

2. *EF*, died on or about the ___ day of _____ 19___. By his last will, dated the ____ day of _____ 19___, he appointed *CD*, his executor (*or*, devised his estate in trust, etc., *or*, died intestate, *as the case may be*).

3. The will was proved by *CD* [or, Letters of Administration were granted, etc.)

4. The defendant has possessed himself of the movable [and immovable, *or* the proceeds of the immovable] property of *EF* and has not paid the plaintiff his debt.

The plaintiff claims that an account may be taken of the movable [and immovable] property of *EF*, deceased, and that the same may be administered under the decree of the court.

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capable of execution and therefore a suit is not maintainable if the decree is barred by time or cannot be executed without leave of the Court of Wards which has not been obtained (*Lachmi Narayan* v. *Md. Mehdi*, 21 PLT 947). In an administration suit whether by an heir or a creditor it is necessary to claim that the estate of the deceased may be collected from wherever it is, that the debts due by the deceased may be ascertained, that the parties entitled to a share in the estate after payment of the debts, be ascertained with their respective shares and that eventually

No. 243—Suit for Administration by Specific Legatee

(Form No. 42, Appendix A, C.P.C.)

(Alter Form No.41 thus)

[Omit paragraph 1 and commence paragraph 2] EF, late of ___, died on or about the __ day of _____ 19__. By his last will, dated the __ day of ____ 19__, he appointed CD his executor, and bequeathed to the plaintiff [here state the specific legacy].

For paragraph 4, substitute-

The defendant is in possession of the movable property of *EF* and, amongst other things, of the said [*here name the subject of the specific bequest*].

Substitute following relief—

The plaintiff claims that the defendant may be ordered to deliver to him the said [*here name the subject of the specific bequest*], or that etc.

No. 244—Suit for Administration by Pecuniary Legatee

(Form No. 43, Appendix A, C.P.C.)

[Alter Form No.41 thus]

[*Omit paragraph 1 and substitute for paragraph 2*] *EF*, late of ____, died on or about the ____ day of _____ 19___. By his last will, dated the ___ day of _____ 19___, he appointed *CD* his executor and bequeathed to the plaintiff a legacy of ____ rupees.

In paragraph 4, substitute "legacy" for "debt".

Another form

EF, the above-named plaintiff, states as follows :

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whatever remains out of the estate after payment of the debts due by the deceased might be distributed among the heirs or persons entitled thereto proportionately (*Sebastias Antontia* v. *Rudolf Minguel Texeira*, A 1962 Bom 4; *Nazarali Kazamali* v. *Fazlam Bibi*, A 1975 Guj 81). All the creditors are not necessary parties (*Mt Shahzadi* v. *Mt. Rahmat*, A 1937 Lah 761), though they are proper parties. If any creditor does not come in and prove his debt, an arrangement made under the decree of the court for rateable distribution of the assets amongst other creditors cannot be disturbed (*Kisandas* v. *Jivat Lal*, A 1936 Bom 423). But such suit cannot

1. *AB* of *K* died on the ___day of _____. By his will, dated the___day of _____, he appointed the defendant and *MN* [who died in the testator's lifetime] his executors, and bequeathed his property, whether movable or immovable, to his executors in trust, to pay the rents and income thereof to the plaintiff for his life; and after his death, and in default of his having a son who should attain twenty-one or a daughter who should attain that age or marry, upon trust as to his immovable property for the person who would be the testator's heir-at-law, and as to his movable property for the person who would be the testator's next-of-kin if he had died intestate at the time of the death of the plaintiff, and such failure of his issue as aforesaid.

2. The will was proved by the defendant on the__day of_____19___. The plaintiff has not been married.

3. The testator was at his death, entitled to movable and immovable property; the defendant entered into the receipt of the rents of the immovable property and got in the movable property; he has sold some part of the immovable property.

The plaintiff claims :

(1) To have the movable and immovable property of AB administered in this court, and for that purpose to have all proper directions given and accounts taken.

(2) Such further or other relief as the nature of the case may require.

No. 245—Administration Suit by an Heir

1. The plaintiff's husband, Abdulla Khan, a Sunni Musalman, died in September 1994, leaving behind him, as his sole heirs, the plaintiff, his widow, defendant No.1, his father, defendant No.2 his mother, defendant

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be brought in respect of the assets of a deceased Hindu who died joint with his son and leaving no separate property (*Meenakshi* v. *Ramaswami Chettiar*, 184 IC 183, A 1939 Mad 552), nor by a Hindu reversioner against a widow (*Bai Vidvagauri* v. *Chaturdas*, A 1940 Bom 411). The procedure of the court in such suits is determined by O.20, R.13. Usually a receiver is appointed in whom the whole property of the deceased vests, and no creditor can, after that, take any proceeding against such estate (*Durgadutt* v. *Bholaram*, 102 IC 413, 29 BLR 409). If any creditor takes any proceeding for execution of his decree, the court has power to restrain him from doing so (*Nicholson Town Bank Ltd.* v. *Vardarajubi Naidu*, 1938 MWN 1127, 48

Nos.3 to 6, his children by the plaintiff, defendant No.7 and one Abdul Kadir now deceased, his sons by Mt. Kamia, his first wife who had pre-deceased him. He left no nearer relative.

2. The said Abdul Kadir, one of the sons of Abdulla Khan by his pre-deceased wife Mt. Kamia, also died in June 1995, and defendant No.8, his widow, and defendant Nos.9 to 17 his sons and daughters are his only heirs, there being no nearer relatives.

3. The said Abdulla Khan was at the time of his death a partner in the firm Abdulla Khan and Ahmad Karim carrying on a leather export business at Kanpur and the plaintiff believes that his share in the assets of the said firm was about a lakh of rupees.

4. The said Abdulla Khan also left some house and immovable property mentioned in Schedule A attached to the plaint which should be deemed to be part hereof. He also left considerable cash and movable property, the exact extent of which the plaintiff does not know. Such property so far as is known to the plaintiff is shown in Schedule B attached to the plaint which should be deemed to be part hereof.

5. At the time of the plaintiff's marriage with the said Abdulla Khan on April 20, 1962, it was verbally agreed between the plaintiff's father and guardian, Iftikhar Hussain, acting for the plaintiff, and the said Abdulla Khan that the plaintiff's deferred dower should be Rs.20,000. The whole of the said dower debt has remained unpaid.

6. By a verbal agreement between the said Abdulla Khan and his sons Abdul Kadir and defendant No.7 on November 20, 1992, the said Abdul Kadir and defendant No.7 relinquished their rights of inheritance in the estate of the said Abdulla Khan in consideration of the latter giving them the immovable property detailed in Schedule C attached to the plaint which should be deemed to be part hereof.

LW 849). The court can direct any party to hand over to the receiver any assets in its possession, but a disputed debt is not such an assets and an order for its payment to the receiver cannot be passed (*Ahmad Din* v. *Mohammad Taqi*, 163 IC 363, A 1936 Lah 365). The receiver can of course bring a suit for recovery of such debt. Court-fee is payable as in a suit for accounts. In order to avoid multiplicity of suits, the court has power to implead in such suit a person who alleges himself to be the heir of the deceased (*Maung Tin* v. *Maung Po*, 103 IC 22). When receiver effects a sale in an administration suit, it is not governed by the provisions of O.21.

The plaintiff claims :

(1) That an account may be taken of the movable and immovable properties and the assets left by the said Abdulla Khan and that the same be administered under the decree of the court.

(2) That the plaintiff's dower debt of Rs.20,000 be paid to her out of the said assets.

(3) That the remaining estate and assets of the said Abdulla Khan be divided amongst the plaintiff and defendant Nos.1 to 6 according to their legal shares.

(4) Alternatively, if the court finds that the relinquishment, alleged in para 6 hereof, is not binding on defendant Nos.7 to 17 they should be directed to restore to the estate, the benefits they have received under the said relinquishment and then the estate may be divided amongst all the heirs of Abdulla Khan according to their legal shares.

No. 246—Suit by a Specific Legatee against an Executor for His Legacy

1. By his last will, dated January 4, 1994 one Ram Sukh of village Nagore, district Etah, appointed the defendant to be his executor and bequeathed to the plaintiff a legacy of Rs.4,000 out of his estate.

The court has full power to rectify any illegality or to set aside a sale, if fraud has been perpetrated, under inherent powers recognised by section 151 of the C.P.C. (*Fatima Sultana Begum* v. *E. Sawanprasad*, A 1977 AP 15). A formal decree for administration should be passed before that estate is actually administered (*Grimault Co.* v. *Premji*, 125 IC 910, 32 BLR 414), but the court is not bound to make an order for administration if the questions between the parties can be properly determined without such order (*Kisandas* v. *Jivat Lal*, A 1936 Bom 423). A suit for partition and administration may be joined if a residuary legatee wants his share out of unascertained residue (*Jiban Krishna* v. *Jitendranath*, A 1949 FC 64).

If a Hindu widow is a party to an administration suit, she can, on application, obtain an order for her future maintenance, but no order for arrears of maintenance can be passed in such a suit (*Maha Sabha* v. *Anna Sohan*, 104 IC 119, 6 Bur LJ 105).

In such a suit a court is not debarred from deciding question of title to property wholly situate outside its jurisdiction (*Amir Bi* v. *Abdul Rahim*, 110 IC 276, A 1928 Mad 760, 55 MLJ 266), or from giving to the plaintiff a larger amount than claimed in the plaint (*Onchan Thwin* v. *Khoo Zun Nee*, A 1938 Rang 254, 177 IC 501). In a suit by an heir, the court may be asked to partition the residue of the estate amongst the heirs (*ibid*). Such a suit can be filed about estate of a deceased undivided

2. The said Ram Sukh died on January 10, 1994.

3. The defendant proved the said will on April 20, 1994 and has since been in possession of the estate of the said Ram Sukh as such executor.

4. The defendant has, since the date of his possession, been realising large sums of money and has always been in a position to pay the plaintiff's legacy but has neglected to pay the same.

The plaintiff prays that the defendant be ordered to pay to him Rs.4,000 and interest at 6 per cent per annum from April 20, 1994, or that an account may be taken of the property of the said Ram Sukh and that the same may be administered under the decree of the court.

Note: If suit is against administrator, necessary changes may be made in paragraphs 1 and 3.

HINDU LAW

No. 247—Suit for Setting aside an Adoption *(b)*

1. The plaintiff is the only child, being a married daughter, of Jamna Prasad deceased.

2. The said Jamna Prasad died possessed of considerable immovable property specified in the schedule at the foot of the plaint in 1958, and his widow Smt. Ramo, defendant, entered into possession on his death.

Hindu father (*Meenakshi* v. *Ramaswami Chettiar*, 1937 MWN 757, A 1937 Mad 785, 173 IC 671). But where the sole purpose is to determine who is the rightful heir an administration suit cannot be filed by one rival heir against another (*Chand Narain* v. *Ghasiram*, A 1940 Lah 179, 189 IC 894).

Limitation: Article 120 (now 113) applies but when the suit is in effect for a legacy Article 123 was held to apply (*Salebhai* v. *Bai Safiabibi*, 36 B 111; *Rajamannor* v. *Venkat*, 25 M 361) but now Article 106 will apply. Suit by a Mohammedan heir against his co-heirs was held to be governed by Article 144 as regards immovable property and by Article 120 as regards movables (*Mohhomedally* v. *Safiabibi*, A 1940 PC 215) but now the former will be governed by Article 65 and the latter by Article 113.

(b) The Hindu Adoption and Maintenance Act (78 of 1956) has made material changes in the Hindu Law of adoption. Prominent among these are:

(1) A daughter can also be adopted. (On pre-Act law regarding daughter or daughter's son, see *Mariammal* v. *Govindammal*, A 1985 Mad 5).

(2) Before making the adoption the adoptive father must obtain the consent

3. The defendant Badri Prasad has wrongfully got his name entered in the municipal records as owner of all the property of the said Jamna Prasad, as the adopted son of the said Jamna Prasad, and both the defendants are falsely giving out that Badri Prasad, defendant, has been validly adopted by Smt. Ramo defendant.

4. The said Badri Prasad was, as a matter of fact, never adopted by the said Smt. Ramo.

5. In the alternative the plaintiff submits that the said Badri Prasad was 18 years old and could not be adopted because of his age, there being no custom in the community to which the parties belong permitting the adoption of boys aged more than 15 years.

6. In the alternative it is submitted that the said Badri Prasad was an orphan and Ram Prasad (his guardian) who purported to give his consent had not obtained the permission of the District Judge.

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of his wife or wives. But if his wife, or any one of his wives, has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind, her consent may be dispensed with.

(3) A widow or an unmarried woman or woman whose marriage has been dissolved can adopt without seeking any one's consent.

(4) A married woman whose husband has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind can adopt without seeking any one's consent.

(5) An orphan can be given in adoption by his guardian with the previous permission of the court.

(6) A step mother cannot give a child in adoption (*Dhanraj* v. *Suraj Bai*, A 1975 SC 1103).

(7) The person to be adopted must be unmarried unless there is a custom to the contrary. When a married person is given in adoption, his wife passes to the adoptive family because husband and wife form one entity and one body. But their son existing on the date of adoption does not lose *gotra* of father nor loses right of inheritance in family of father before adoption. But son born after the date of adoption though conceived earlier succeeds as heir to father's property in adoptive family (*Tarabai Himgonda Patil* v. *Babgonda Bhan Patil*, A 1981 Bom 13).

(8) The person to be adopted must not have completed the age of 15 years, unless there is a custom to the contrary.

(9) If a male adopts a daughter or a female adopts a son, the difference between the ages of the persons adopting and adopted must be at least 21 years.

(10) Performance of *Datta Homan* is not necessary.

7. That no giving or taking actually took place.

The plaintiff claims:

(1) A declaration that the defendant Badri Prasad is not the adopted son of the said Jamna Prasad.

(2) In the alternative, a declaration that the adoption of Badri Prasad by Smt. Ramo is null and void.

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(11) An adoption takes effect from the date of adoption and does not relate back to the death of the father (*Banabhai* v. *Wasudeo*, A 1979 Bom 181).

(12) Subject to any agreement to the contrary, an adoption does not deprive the adoptive father or mother of the power to dispose of his or her property, transfer *inter vivos* or by will.

(13) An adopted child cannot divest any person of any property which vested in him or her, before adoption (*Vasant* v. *Daltar*, A 1987 SC 398; *Y.K. Nalavada* v. *Ananda Chavan*, A 1981 Bom 109).

(14) If a registered deed of adoption, signed by the person giving and the person taking, is produced in court, the court shall presume that a valid adoption has been made until it is disproved.

A custom recognising adoption does not cease to operate after the enforcement of the Hindu Adoption and Maintenance Act, 1956 (*Jupudi Venkata Vijaya Bhaskar* v. *Jupudi Kesava Rao*, A 1994 AP 134). No inference is to be drawn that a person who has performed the funeral rites of the deceased is adopted son of the deceased, the factum of adoption must be established by evidence (*V. Lakshminaraya* v. *V. Bhoodamma*, 1994 (2) ALT 445 AP). In Bombay, custom permits adoption of a child at any age (*Kondiba Rama Papal* v. *Narayan Kondiba Papal*, A 1991 SC 1180). The mother's power to take in adoption is not revived by the re-marriage of her deceased's son's widow (*Ashbai Kate* v. *Vithal Bhika Nade*, A 1990 SC 670). Effect of adoption see *Dina ji* v. *Daddi*, A 1990 SC 1153).

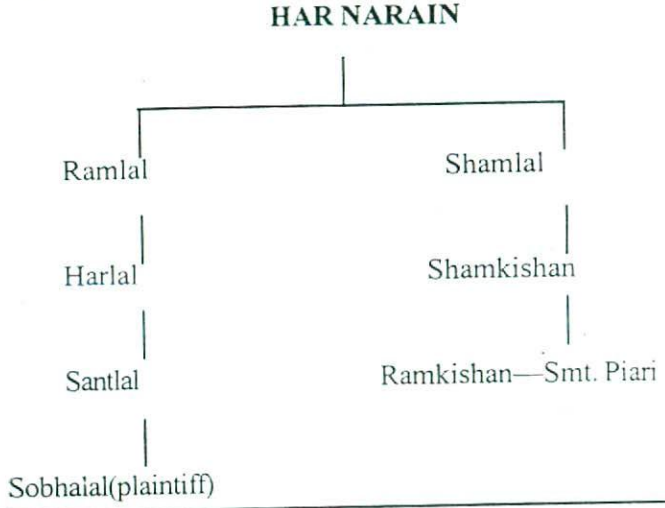
Limitation: Three years under Article 57 from the time when the alleged adoption becomes known to the plaintiff.

Defence: The defendant may affirm the fact of his adoption, if it is denied. He may challenge the ground on which it is sought to set aside the adoption. For instance, **if want of authority is alleged by the plaintiff, the defendant may set up authority of the husband, giving particulars of it as to when, how, and in what terms the authority was given.** He may similarly set up any custom to justify the adoption of a person of otherwise prohibited relationship or the adoption of a grown-up man. Whenever any such custom at variance with the ordinary Hindu Law is alleged by the defendant, particulars of it should be set out, e.g., whether the custom is local or communal, (i.e., of the particular caste or sub-caste) and what are the terms and incidents of the custom (*Lachmi* v. *Sangram*, 15 IC 322, 10 ALJ 136), and a plea of one particular custom cannot be altered into that of another during the progress of the suit (*Suraj Bali* v. *Tilok Chand*, 36 IC 66, 3 OLJ 327). If the plaintiff is the

No. 248—Suit by a Reversioner for Possession of Property Against Transferee of a Widow *(c)*

1. The plaintiff is, and one Ramkishan was, a Hindu governed by the Mitakshara law of the Benares school.

2. The plaintiff is related to Ramkishan as shown by the pedigree given below—



adoptive father, the defendant may plead an estoppel by showing that circumstances have arisen in which the likelihood of hardship to be caused to him by upsetting the adoption on which all parties have acted for a long time is so great that it will be inequitable and unjust to allow the plaintiff to bring the suit. In such a case it is not necessary for the defendant to prove that he was actually damnified by the plaintiff resiling from the story of adoption but it would be enough if he proves the likelihood of his being prejudiced by the alteration of position *(Josyam* v. *Josyam* 103 IC 855). In such a case all the circumstances should be fully alleged and the onus lies on the plaintiff to prove that the adoption never in fact took place, or that the adoption was invalid.

(c) The Hindu Succession Act (30 of 1956) has revolutionised the Hindu law. It makes a female Hindu the absolute owner of the property possessed by her, whether it was acquired before or after the commencement of the Act. A reversioner cannot now avoid, on the mere ground of the absence of legal necessity, the alienations made by widows after the commencement of the Act. He will have also to allege that the property had been acquired by the widow by way of gift or under a will or any other instrument or under a decree or order of a Civil Court or under an

3. The said Ramkishan was owner of the property mentioned at the foot of the plaint.

4. On the death of the said Ramkishan in 1940, Smt. Piari entered into possession of the property as his widow. (*If the widow died on or after 17-6-56, say that* after the death of said Ram Kishan, Smt. Piari entered into possession of his estate under a gift or a will or any other instrument, or under the decree or order of a Civil Court or under an award and the terms of the said gift, will or other instrument or the decree or order or award gave her a life estate only").

[*Give particulars of such instrument, decree, etc.*]

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award and the terms of the said gift, will or other instrument or the decree or order or the award gave her a life estate only (*Mst. Karmi* v. *Amru*, A 1971 SC 745). A female Hindu possessed of the property on the date when the Hindu Succession Act came into force could become absolute owner only if she was a limited owner. The legislature did not intent to extend the benefit of enlargement of estate to any or every female Hindu irrespective of whether she was limited owner or not (*Kalawati Bai* v. *Soiryabai*, A 1991 SC 1581). Where the widow was entitled only to limited estate for maintenance and was in possession of her limited estate enlarged into full absolute ownership and by operation of section 14(1) of the Hindu succession Act she became absolute owner of the property (*Vijay Pal Singh*, v. *Dy. Director of Consolidation*, (1995) 5 SCC 212, A 1996 SC 146).

Where a Hindu wife gets land in lieu of maintenance from her husband and she enjoys the produce thereof, her rights become absolute by virtue of section 14 (1) of the Hindu Succession Act (*Maharaja Pillai Laksmi Ammal* v. *Maharaja Pillai Thillanaya- Kom Pillai*, (1988) 1 SCC 99; *Gulwant Kaur* v. *Mohinder Singh* A 1987 SC 2251). On remarriage a Hindu widow is not divested of the right vested in her in the property of the first husband (*S. Gajodhari Devi* v. *Gokul*, A 1990 SC 46).

The Act came into force on June 17, 1956. As a widow becomes full owner under the Act she can alienate as she likes but alienations made by widow prior to the commencement of the Act will be governed by the old law and can be challenged by the reversioners (*Roopa Ram Bhargava*, v. *Hanuman Pd. Bhargava*, A 1966 SC 216).

For the effect of section 14 (1) or 14 (2) of Hindu Succession Act, on the right of a widow who succeeded to her husband's estate prior to June 17, 1956, see *Gummalapura Taggina Matada Kotturuswami* v. *Setra Veeravva*, A 1959 SC 577; *R.B.S.S. Munnalal* v. *S.S. Rajkumar*, A 1962 SC 1493; *Sukh Ram* v. *Gauri Shankar*, A 1968 SC 365; *Badri Prashad* v. *Kando Devi*, A 1970 SC 1966; *V. Tulsammi* v. *Shesha Reddi*, A 1977 SC 1944; *Bai Vajia* v. *Thakorbhai*, A 1979 SC 933; *Mst. Karmi* v. *Amru*, A 1971 SC 745.

5. The said Smt. Piari sold the property to the defendant without any legal necessity on 20th August 1941 and the defendant is in possession of the said property since that date.

6. Smt. Piari died on August 10, 1954.

In such a suit **the plaintiff must allege his title to the property and the defendant's possession under the transfer from the Hindu widow. It is always proper in cases governed by Hindu Law to state by what branch of that law the parties are governed** and then other inferences of law, e.g., that the widow's interest was limited to her life or was an absolute interest, need not be alleged as the court will presume them.

A party dealing with a Hindu widow or other limited owner and advancing money to such limited owner so as to bind the estate in the hands of such owner must take particular care to see that his dealing could be supported even if they happen to be impeached after a length of time. The alienee or transferee is bound to secure the necessary evidence even at the inception so that he may be in a position to defend his title at the time, an attack is made long after wards, after the death of the widow by the then reversioner (*Thampuranthozha Illai* v. *Thiruvavakarasu Bandaram*, 5 DLR (TC) 507). In such a suit if the defendant has erected buildings on the land transferred to him, the plaintiff may ignore the building in his claim and pay court fee on the value of land only (*Durga* v. *Nihal*, 110 IC 319, A 1928 Lah 852).

The plaintiff some time offers in the plaint to pay as much as is found to have been taken for legal necessity, but such offer is not necessary as the court can always give such relief.

Mesne Profits: Such a transfer is not void *ab initio* but only voidable (*Jugalkishore* v. *Charoo Chandra*, 181 IC 341, A 1939 PC 159, 1939 MWN 963). Therefore *mesne profits* can be claimed only from the date on which it is impeached. The plaintiff should, therefore, specify that date. It can be impeached by an oral demand for possession which, if refused, converts the posssession forcibly (*Sitaram* v. *Maroti*, 103 IC 259). If it is not impeached before suit, it will be considered to be impeached when the suit is filed and mesne profits can be claimed only after that date (*Bhirgu* v. *Narshing*, 14 ALJ 1161; *Mohan Lal Khub Chand* v. *Jaitiwala Anandram*, ILR 1938 Bom 292, 40 BLR 394, A 1938 Bom 298, 175 IC 76).

Limitation : Twelve years from the widow's death (Article 65) for mesne profits only three years under Article 113.

Defence: The defendant may deny the pedigree or set up a nearer heir, or may plead that the widow's right was absolute and not limited for life (e.g. under a custom or under a transfer by the husband), or that the transfer was justified by legal necessity. Where necessity is shown, lender is not bound to ascertain how it was brought out (*Rajeshwar Bali* v. *Har Krishan Lal*, 10 OWN 147, A 1933 Oudh 170). The particulars of the necessity for which the transfer was made should be set out in the written statement. If the alienation was made after the commencement of the Hindu Succession Act defendant can contend that the widow had become

7. All the persons mentioned in the above pedigree except the plaintiff has died before the death of Smt. Piari and the plaintiff, therefore, became the sole heir of the said Ram Kishan on the death of the said Smt. Piari.

8. On June 20, 1955 the plaintiff sent a registered notice to the defendant impeaching the said transfer and demanding delivery of the said property to him.

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absolute owner and therefore the reversioner has no interest in the property.

Consent of the person who was the next reversioner at the time affords a good presumptive proof of necessity, and the transferee may rely on it without giving evidence *alinude* of the legal necessity or of his honest belief in the necessity. He will succeed if the presumption raised by the consent is not rebutted by the plaintiff by contrary proof of the absence of necessity (*Rangaswami* v. *Nachiappa* 42 M 523 PC; *Inayat* v. *Jaddu*, 1933 ALJ 42, A 1933 All 169, 149 IC 108; *Debi Prasad* v. *Golab Bhagat*, 40 C 721). But if there were several reversioners at the time of transfer, the consent should be of all and not that of some of them only (*Yeshwantrao* v. *Tulsibai*, 99 IC 835 Nag.). If a transfer, was unjustified (as a dedication of 3/4th of the property to a deity), the consent of reversioners cannot make it valid. Even the consenting reversioners can impugn it, as consent only amounts to an agreement, not to question which being without consideration is void (*Debi Dayal* v. *ShriRadha Krishna*, 180 IC 880, A 1939 Oudh 145). However, if the circumstances are such that the consent amounts to estoppel, the reversioners will be estopped, e.g., when he was himself a party to the alienation and had received benefit under it (*Ramgowda* v. *Bhau Sahib*, A 1927 PC 227; *S. Shanmugham Pillai* v. *K. Shanmugham Pillai*, A 1972 SC 2069), but the reversioner can challenge the alienation if he can prove that his consent was obtained by a false representation as to the existence of necessity (*Harendra Nath* v. *Hari Pada*, 182 IC 852, A 1939 Cal 387). But mere attestation by a reversioner is no presumptive proof in the absence of recitals of necessity (*Satya Narain* v. *Vaikama*, 145 IC 862, 1933 MWN 1301, A 1933 Mad 637). Also see *Ram Dulare* v. *Baitul Bibi*, A 1976 All 135). The consent of a presumptive reversioner will, however, not be binding on one who later becomes the actual reversioner (*Kalishanker* v. *Dhirendra Nath*, A 1954 SC 505).

The defendant may show that the transfer in dispute was made with the consent of the plaintiff, as in that case, even if it was without legal necessity, the plaintiff cannot impeach it by reason of his having elected to treat it as valid (*Akaram* v. *Sayadhkhan*, 51 B 475, 102 IC 232, 29 BLR 386, A 1927 Bom 260 FB; *Fateh Singh* v. *Thakur Rukmani*, A 1923 All 387, 45 A 339, 72 IC 8, 21 ALJ 235 DB; *Umakant Naik* v. *Naka Palai*, 1973 (1) CWR 497). The Supreme Court in *Jaisri Sahu* v. *Rajdewan Dube*, A 1962 SC 83, held that the widow as owner has the fullest discretion to decide what form the alienation should assume if there is necessity for transfer. A sale to pay off a usufructuary mortgagee, who has no right to sue for his money was on that ground held valid. The defendant can rely on this principle also.

The plaintiff claims:

(1) Possession of the said property.

(2) Rs.1,000 on account of one year's mesne profits from June 20, 1955 to the date of suit with interest, and future mesne profits until the date of delivery of possession.

No. 249—Suit by a Reversioner for Declaration that a Hindu Widow's Transfer is not Binding *(d)*

1. One Ramkishan was a Hindu governed by the Mithakshara law of the Benares school.

2. The said Ram Kishan was owner of the property detailed at the foot of the plaint.

3. The said Ramkishan died in 1960, and on his death defendant No.1 entered into possession as his widow under a will [*or*, gift *or* any other instrument *or* under a decree *or* order of a civil Court *or* under an award] and the terms of the said will [*or*, gift *or* other instrument *or* the decree *or* order *or* award] gave her life estate only. [*Give particulars of instrument, decree, etc*].

Partial Justification: If the vendee has made enquiries and found that there was necessity for the sale, he is not bound to show the application of the whole consideration money to the said necessity (*Sri Krishandas* v. *Nathu Ram*, 35 ALJ 80, 100 IC 130, A 1927 PC 37, 1927 MWN 89, 38 MLT 48, 4 OWN 184). If the application of the bulk of the proceeds of the sale are accounted for, the fact that a small part is not accounted for will not invalidate the sale, but in such cases transferee can be ordered to pay the money not accounted for (*Inderjit* v. *Jaddu*, 144 IC 108, 1933 ALJ 42, *Subramanya* v. *Kupuswami*, 1933 MWN 152, *Ishwardevi* v. *Jagannath*, 1940 ALJ 15). This does not mean that the sale will be invalidated whenever the part of the consideration not accounted for cannot be described as small. If the sale is justified by legal necessity it will stand (*Srinath* v. *Jagannath*, A 1930 All 292). In a case where it was found that half of the total consideration was for binding purposes, the purchaser was allowed to retain half the property for the entire consideration (*Mahalakshmi* v. *Tirupurasundrama*, 133 IC 198, 62 MLJ 478, A 1931 Mad 53). This principle does not, however, apply to a mortgage which is good only to the extent of necessity proved (*Shidaya* v. *Basaprap Happa*, 183 IC 568, A 1939 Bom 301; *Purushottam* v. *Gangadhar*, A 1939 Bom 445).

(d) After the commencement of the Hindu Succession Act such a suit is not maintainable merely on the ground of the absence of legal necessity. Allegations contained in para 3 (precedent No. 249) will have also to be made besides raising the plea of absence of legal necessity. Such a suit can be brought only by a

4. The plaintiff is related to the said Ramkishan as per pedigree given below.

Pedigree

* * * * *

5. All the persons mentioned in the said pedigree of a degree higher than the plaintiff are dead, and the plaintiff is therefore, the nearest reversionary heir of the said Ramkishan.

(*Or*, all the persons mentioned in the said pedigree higher than the plaintiff are dead, except Ram Bihari who is colluding with the defendant and does not challenge the transfer hereinafter mentioned).

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reversioner and not by a stranger as the alienation is not void but voidable at the instance of the reversioner (*Mst. Kishori Kunwar* v. *Parmeshwar*, A 1948 Pat 457). A reversioner is not bound to institute such a suit. The object of such a suit is to secure a declaration to be of help to the reversioners after the death of the widow, as otherwise evidence regarding the true character of the alienation might disappear (*Dula* v. *Bai Jivi*, 39 BLR 1072, A 1938 Bom 37, 174 IC 24). Such a suit is brought on behalf of the entire body of reversioners or the person who would be the actual reversioner on the death of the widow, and no suit for the benefit of the plaintiff alone can be maintainable (*Banshidhar* v. *Dulhatia*, 23 ALJ 329). Therefore on the death of the plaintiff the other reversioners and not his personal heirs should be substituted (*Rameshwar* v. *Ganpati Devi*, A 1936 Lah 652). The prayer should **therefore, be not (as is common) a declaration that the transfer is null and void against the plaintiff but that it would be null and void after the death of the widow, or against the reversioners of so and so.** The result of such a suit would be binding on the whole body of reversioners on the death of the widow (*Kuar Mata Pd.* v. *Kuar Nageshar Sahai*, A 1925 PC 272), whether anyone was or was not in existence at the time the decree was obtained (*Narain* v. *Waryam*, A 1928 Lah 545, 111 IC 139 DB), unless the suit is proved to have been collusive (*Gadhu Singh* v. *Bansgopal* A 1929 All 859 DB). Sometimes when a suit it brought for possession on the death of the widow, a long time after the alienation, courts are prepared to accept slight evidence of the legal necessity and comment on the plaintiffs not having sued for declaration at a time when full evidence was available.

The plaintiff must show that he is the next reversioner, i.e., if the widow died immediately he would succeed to the property. He has to establish the relationship and to satisfy the court that to the best of his knowledge there are no nearer heirs (*Javitri* v. *Gendansingh*, 102 IC 167; *Sarfaraz* v. *Mt. Rajana*, 112 IC 834, A 1929 Oudh 129, 4 Luck 19). It is not necessary that the plaintiff should be reversioner to the full proprietary interest but even a reversioner who will take only for life, e.g., a daughter, can sue (*Matru Mal* v. *Mehri*, A 1940 All 311, 189 IC 600). Even a remote reversioner can sue (1) where the next reversioner refuse without sufficient cause

6. The defendant No.1 has sold the said property to defendant No.2 without any legal necessity on 20th August 1960 and put the defendant No.2 in possession of the said property.

The plaintiff claims a declaration that the said sale would be null and void after the death of defendant No.1.

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to sue or has colluded with the limited heir, or has concurred in the alienation (*Avola* v. *Avola*, 18 IC 212 M; ***Bakhtawar*** v. *Bhagwan*, 32 A 176; *Satindra* v. *Sarola* 27 CLJ 320, 45 IC 59; *Somnath* v. *Laxman*, A 1962 Orissa 38), or (2) when he is himself the transferee but in all such cases, the plaintiff must state the exceptional circumstances giving him a right to sue (*Musammat Viranwali* v. *Kundal Lal*, 9 Lah 106). If he does not, but sues merely as a next reversioner, he cannot on being found not to be the nearest reversioner, plead that he had brought the suit because the nearest reversioner had refused to bring the suit or had precluded himself from bringing it (*Sita Ram* v. *Jagat*, 102 IC 296 A; *Lalta Prasad* v. *Dwarka*, 195 IC 492, A 1941 All 313). A remote reversioner cannot sue merely because the next reversioner is a female but he can be allowed to sue if there are special circumstances, for example collusion, concurrence or refusal of the next reversioner. It is proper in such cases to implead the next reversioner as a *proforma* defendant, though there is no defect if he is not impleaded (*Deoki* v. *Jwala Prasad*, 26 ALJ 449). If the nearest reversioner is a minor, a remote reversioner cannot bring a suit except in the minor's name as his next friend (*Kali Charan* v. *Baghera*, 23 ALJ 653, A 1925 All 585).

The plaint should next allege facts showing that the tranferor has only a life estate in the property and that she has made transfer extending beyond her life, and that without any legal necessity. The prayer should be for a declaration that the alienation would be void against the reversionary heir after the death of limited owner. One should be careful not to sue for a declaration that it is immediately void, for such a declaration cannot be given, nor can a declaration of the plaintiff's reversionary rights to inherit the property be claimed (*Mannumal* v. *Raja Ram*, 20 ALJ 282; *Janki Ammal* v. *Narayanasami*, 31 MLJ 225, 14 ALJ 997, 24 CLJ 309, 37 IC 161). There is only one cause of action for the whole body of reversioners in respect of their right to challenge an alienation by a limited owner and if such a suit is not brought within the period of limitation, the whole body of reversioners existing or subsequently born are debarred from suing (*Dehai Mahton* v. *Moti Mahton*, 10 PLT145, A 1938 Pat 510, 178 IC 643).

Limitation: Twelve years from date of alienation (Article 108). When a minor widow's guardian made a mortgage and the widow on coming of age renewed it by executing another mortgage deed, it was held that the reversioner's suit brought more than 12 years after the former mortgage was time-barred though filed within 12 years of the latter (*Adeyya* v. *Govinda*, 58 MLJ 417).

Defence: Same as in a suit for possession on the death of the widow.

No. 250—Suit by a Reversioner to Restrain Waste by a Hindu Widow *(e)*

Paras 1-5 (*As in the previous precedent, except that "defendant" should be substituted for* "defendant No.1")

6. The defendant is mismanaging the said property and is deliberately committing waste thereof to injure the plaintiff's reversionary rights, and threatens and intends unless restrained from doing so, to dissipate the whole property, so that nothing or a very small portion of it, may be left after her death.

Particulars of Waste

(i) In the month of October, 1984, the defendant lent certain valuable silverware and carpets of the estate of her husband to her brother's son Ramadhin on the occasion of the marriage of the latter's daughter. The said Ramadhin never returned them and defendant has taken no steps to recover them.

(ii) In December, 1984, the defendant has cut down 20 green and useful trees from the grove of her husband at Islamnagar and converted them into money.

(iii) In January, 1985, in consideration of substantial cash payments, the defendant has given permission to one Sridhar to dig *Kankar* in the whole land of village Shamspur forming part of her husband's estate, thereby rendering the land unfit for cultivation.

(iv) In the rains of the last week of January, 1985, a portion of the roof of the house of Ramkishan in *mohalla* Ramapura had fallen down, and instead of repairing the same, defendant pulled down the house and sold the materials and appropriated the price thereof.

(e) No such suit lies if the widow has become an absolute owner under section 14 (1) of the Hindu Succession Act. A suit will, however, lie if the widow's status is that of a limited owner on the allegations made in para 3 of the preceding precedent No. 249. **After showing his right as a reversioner and the defendant's right as a limited owner, the plaintiff must go on to allege that the woman is committing waste of the property**. The court will not issue an injunction unless a very clear case of real danger to the *corpus* of the property is made out (*Suraj Narain* v. *Ramdevi*, 179 IC 447, A 1939 Oudh 78), and instances of waste must be set forth in the plaint. Mere alienation is not waste and no suit to restrain the widow from alienating the property can lie (*Renka* v. *Bholanath*, 28 IC 896, 37 A 177; *Dhup*

Particulars of Mismanagement

(In addition to the above acts)

(i) The defendant has dismissed without any sufficient reason, Babu Ram Pratap who had very creditably managed the property in the lifetime of her deceased husband and has appointed one Rahim Baksh as the manager.

(ii) The said Rahim Baksh has granted long leases on very small rents to Bulla, Abdulla, Nisar and Mushtaq and has taken Rs.11,500 from Bulla, Rs.7,800 from Abdulla and substantial but unknown sums from Nisar and Mushtaq as premiums.

The plaintiff claims:

(1) An injunction to restrain the defendant from committing any act of waste in respect of the said property.

(2) Appointment of a receiver.

No. 251—Suit for Setting Aside Alienation Made by a Hindu Father *(f)*

1. The plaintiffs are sons of defendant No.2 and are, and have always been, members of a joint Hindu family with him. The said family is governed by the Mitakshara law of the Benares school.

Rani v. *Chail Bihari*, 5 OWN 556, 111 IC 248). The plaintiff may pray for an injunction to restrain her from committing waste, or if there is a strong case of mismanagement, for her removal from the management of the property and for the appointment of a receiver (*Tanikachala* v. *Alamebelu*, 25 IC 153 M; *Shyam Lal* v. *Bhagwanti Bai*, 1977 MPLJ 143), but this is done only in very rare cases.

Limitation : Three years from the time when the waste begins (Article 89). Section 22 will not apply though the waste is continuing wrong, as time under the Article runs from the beginning of the waste (*Dhanjibboy* v. *Hirabai*, 25 B 644).

Defence: Besides pleading that the plaintiff is not the reversionary heir, or that the defendant's right is not a limited one, the defendant may deny that she is committing waste, and may explain away the instances alleged by the plaintiff.

(f) An alienation made by one member without the consent of the other members of a joint Hindu family governed by the Mitakshara law as prevalent in Bengal and Benares is altogether invalid and is not valid even to the extent of the transferor's share (*Babu Singh* v. *Lal Kr.*, 1933 ALJ 1547, A 1933 All 830; *Laxmi Devi* v. *Kala Devi*, A 1977 All 509; *Manoharlal* v. *Dewan Chand*, A 1985 P & H 313, FB; distinguished *Balmukund* v. *Kalawati*, A 1964 SC 1385). The Madras High Court is of the view that while a coparcener can alienate his own undivided share

2. The property mentioned at the foot of the plaint was the joint family property of the plaintiffs and defendant No.2.

3. By a hypothecation deed, dated November 20, 1980 the said defendant No.2 mortgaged the said property to defendant No.1.

4. The mortgage was made without a legal necessity, or, at any rate, there was no legal necessity to borrow money at such a high rate of interest.

(*Or*, the plaintiffs do not admit the existence of the antecedent debts alleged in the mortgage-deed as being the consideration of the mortgage).

(*Or*, the antecedent debts, alleged to be the consideration of the mortgage, were incurred for the purpose of gambling at *Diwali* which fell a few days before the date of mortgage.

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for a consideration, he cannot make a gift or devise of it and such a transaction is void (*Kulasekhara Perumal* v. *Pathakutty*, A 1961 Mad 405) the alienee for consideration can sue for partition as he stands in the shoes of the alienating co-parcener (*Sellammal* v. *Perimmal*, A 1962 Mad 144). According to the Assam High Court interpretation of the Benares School, a coparcener can alienate for value his undivided interest without the consent of his other coparceners, only for legal necessity or for payment of the father's antecedent debts. The transfer is not void, but voidable at the instance of the non alienating coparceners (*Ramprasad Karu* v. *Kripesh Kumar*, A 1961 Assam 54). The transferor's son under the Bombay School, or subsequently adopted son cannot challenge it (*Basawantappa* v. *Mallappa*, 182 IC 302, A 1939 Bom 178). Under the orthodox Benares School even the consent of the manager, who is under disability cannot validate a transfer by a junior member (*Sarju Pd.* v. *Ram Saranlal*, 132 IC 568, 1931 ALJ 400, A 1931 All 541). The only exceptions to this general rule are the cases of father and manager. Both can alienate the family property for a legal family necessity or to pay off antecedent debts but if the alienor is the manager, the antecedent debts must be proved to have been incurred for family necessity. This is not necessary in the case of a father (*Raja Bahadur* v. *Mangala Prasad*, 21 ALJ 934 PC). A pronote executed by *Karta* of Hindu joint family to discharge antecedent debt is binding on the coparceners (*B. Bhogeswara Rao* v. *P. Ramkrishna Rao*, 1995 All. HC 3134 (AP). It has been held in Madras that even if no legal necessity is proved but the alienation was for the benefit of the estate it will be upheld (In the matter of *A.T. Vasudevan*, A 1949 Mad 260, (1948) 2 MLJ 47).

The *Karta* rightly sold joint family property to pay debt and taxes incurred by the firm run by all major members of the joint family (*Mukesh Kumar* v. *Col. Harbans Waraiah*, A 2000 SC 172). Even where the debt incurred by the father is not for legal necessity or for the payment of the antecedent debt, the son is liable to pay the same under the theory of pious obligation. Thus where the father and the son were living as members of joint family, the father stood surety for the payment of certain

(*If necessary, add,* —5. Though the plaintiffs were born after the date of the said transfer, yet their elder brothers Ramlal and Kishanlal were in existence when the said mortgage was made and they did not consent to the said mortgage).

The plaintiffs claim, a declaration that the said mortgage is null and void.

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amount to the defendant, the son was held liable (*Velumani* v. *Narayansami*, (1996) 1 Mad 195 (Mad).

It seems, however that one member can transfer his share in season of distress, or for the sake of the family or for spiritual purposes. It has been held that a junior member can transfer the family property and incur debts binding on it in times of distress and family necessity (*Dhanukdhari* v. *Rambirich*, 70 IC 391, 1 Pat 171, A 1922 Pat 553 DB). In some cases without insisting on the condition of "distress" it has been held that a member can borrow money on the security of family property or can alienate it for a family necessity just like a manager (*Inder Chand* v. *Bidya Dhar*, 60 IC 282, A 1921 Pat 45 DB; *Ramdas* v. *Tanak Singh*, 111 IC 51, A 1928 Pat 557 DB). A mortgage by one member of his individual share in joint property is not *ab initio* invalid and therefore it attaches to the share which he gets on partition (*Kharag Narain* v. *Janki Rai*, 169 IC 906, A 1957 Pat 546). Such an alienation is voidable at the instance of the persons affected by it (*Jageshar* v. *Deo Dat*, 21 ALJ 608, 45 A 654; *Ram Kumar* v. *Mohanlal*, A 1940 Pat 270, 185 IC 788; *Ram Prasad Karia* v. *Kripesh Kumar*, A 1961 Assam 54; contra *Kahinath* v. *Bapu Rao*, A 1940 Nag 305). Therefore a member of the joint family who did not join in, or consent to, the alienation can sue to have it set aside. A person who was not in existence or even in his mother's womb at the time of the alienation cannot question it after his birth (*Tulsi* v. *Babu*, 8 ALJ 733; *Ram Saran* v. *Ganga*, 13 ALJ 169; *Daulat Kuer* v. *Ramdas*, A 1940 All 349, 189 IC 712, 1940 ALJ 366). If the transfer was not made with the consent of other members then in existence, even an afterborn son can impugn it (*Tulsi* v. *Babu*, 8 ALJ 733; *Surajpal* v. *Panchaiti*, 183 IC 270, A 1939 All 486; *Bhagwat Pd.* v. *Dehi Chand*, 20 Pat 727; contra *Adapa* v. *Vernalepatti*, A 1944 Mad 33, relying on *Lal Bahadur* v. *Ambika Pd.*, A 1925 PC 264). But if there is a person in existence at the time of alienation who is competent to challenge the alienation, an afterborn reversioner can challenge it, but he cannot avail of any extension of limitation on this account as time begins to run against all persons competent to challenge it from the date of alienation, though he can avail of any extension which could be allowed to the reversioner in existence (*Govind* v. *Ram Lal*, A 1937 Lah 420; *Sri Sai Baba* v. *M.L. Hanumantha Rao*, (1980) 2 MLJ 518). If the reversioner in existence fails to challenge it within limitation, another reversioner who was minor at the time cannot claim extension of time on account of his minority (*Matu* v. *Jati*, 170 IC 541, A 1937 Lah 485). If the child who objects to the alienation is conceived after the alienation but during the life of a child conceived before the alienation, then that overlapping of the two lives enables the later born son to

No. 252—Suit for Possession of Family Property Sold in Execution of a Mortgage Decree

Paras 1-3 (*as in the previous precedent*).

4. The said property was sold in execution of a decree for sale obtained by the said defendant No.1, against defendant No.2 and has been purchased by defendant No.3, who is in possession as such purchaser.

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contest the alienation (*Shri 108 Pujapad* v. *Surajpal*, A 1945 PC 1). A debt by a father required by him for a trade, which is not the normal occupation of the family cannot be branded as immoral so as not to be binding on the sons. The liability of the grandsons and sons to pay ancestral debt is only to the extent of their interest in the joint family property (*Subbu and Co.* v. *Minor Madhava Sudarsanam*, 1995 (2) MLJ 152 (Mad) DB).

The plaintiff may make an alternative prayer that if the transfer be held to be valid to the extent of the father's share—a decree for possession of his share only may be passed. In that case, defendant may sue for general partition so that both the suits may be tried together and the transferred property may be allotted to him in lieu of the father's share but the sons's suit cannot be converted into one for partition. (For full discussion of this matter and the form of decree in such cases see *Kandaswami* v. *Velayutha*, 96 IC 993, 51 MLJ 99, A 1926 Mad 774 DB).

In a suit to contest the alienation, **the plaintiff should allege (1) that he is a member of a joint Hindu family, (2) that he has an interest in the property alienated (for he has no right to attack a sale of self-acquired property of a transferor); (3) the particulars of the alienation and (4) facts showing its invalidity.** The last item requires some explanation. Ordinarily, a plaintiff, impeaching the alienation either by a suit for declaration of its invaldity, as in the case of a simple mortgage, or in a suit for recovery of possession, as in the case of a sale or usufructuary mortgage, must allege that the transfer was made without a legal necessity. If it purports to have been made by the father for an alleged antecedent debt, the plaintiff may simply deny the existence of such debt, or may impeach it on the ground of immorality or illegality. For a clear and concise statement of the law relating to the liability of the son's share of the joint family property for the debts of the father, see *Panna Lal* v. *Mst. Naraini*, A 1952 SC 170; *Viridhe Chalam* v. *Chaldean Bank*, A 1964 SC 1425; and *Vathilinga Naicker* v. *Vivekananda Reddiar*, (1981) 2 MLJ 86. The burden of alleging and proving circumstances justifying the transfer will be on the transferee. Where however, the property has been sold in execution of a decree on a mortgage, by the father has thus passed out of the hands of the family, the plaintiff cannot succeed without proving that the debt for which the mortgage was made was an immoral or an illegal debt (Jadubir v. Gajadhar, 21 ALJ 809), and the auction purchaser, if he is a stranger, was aware of the fact (*Suraj Bansi* v. *Sheo Prasad*, 5 C 148 PC; *Sitla Prasad* v. *Chameli*, 21 ALJ 683). In

5. The plaintiffs were no parties to the said decree.

6. The mortgage of November 20, 1980 was made by defendant No.2 in order to pay off his debts incurred in *badhni* or grain gambling transactions with the said defendant No.1 in *Baisakh, Samvat* 2030

such cases it is not sufficient to allege mere want of legal necessity, but it should be definitely alleged that the debt was an immoral or an illegal one and that the purchaser knew it (*Faqir Chand* v. *Harnam Kaur*, A 1967 SC 727).

Father's alienation even when for legal necessity can be impeached by son on the ground of inadequacy of consideration (*Dudhnath* v. *Samarain Ram*, A 1966 All 315; *Prasad* v. *Govindswami Mudaliar*, A 1982 SC 84). The sons while attacking the mortgage can attack the rate of interest also (*Nawab Nazeer Begum* v. *Rao Raghunath*, 17 ALJ 591, 36 MLJ 521). It is, therefore, better to take this ground also in the plaint in the alternative if possible.

In a suit for partition where the plaintiff assails the alienations made by his father during his minority, it is not necessary for the plaintiff to seek cancellation of the same and to pay court-fee for the same (*Kamakshi Ammal* v. *Rajalakshmi*, A 1995 Mad 415 (DB); *C.R. Ramaswami* v. *C.S. Rangacharia*, A 1940 Mad 113 followed).

It is not sufficient to establish general immorality or extravagant life of the father but it must be proved that the particular debt was incurred for immoral or illegal purposes (*Shanti Sarup* v. *Jangiri*, 110 IC 273; *Tulsi Ram* v. *Bishnath*, 50 A 1, A 1927 All 735 DB; *Sri Narain* v. *Lala*, 17 CWN 124, 17 IC 729 PC; *Narayan* v. *Chamber of Commerce*, 1969 Raj LW 107). General allegations of immorality of the father should not therefore be made in the plaint in support of the allegation of want of necessity. If the debt is alleged to be immoral, that fact may be definitely alleged and full particular of the alleged immorality showing how the debt was connected with the acts of immorality must be given. It would not do merely to allege that the debt was taken for immoral purpose or for gambling (*Tulsi Ram* v. *Bishnath*, A 1927 All 735, 50 A1 DB).

"Immoral" in this connection is not to be taken in a narrow sense, but if the action of the father which resulted in the debt, was infected with an element of criminality, the debt is immoral, e.g., in case of money misappropriated by him. A transfer to pay up on such money would be void (*Jagannath* v. *Jugal Kishore*, 23 ALJ 882, 89 IC 492; *Brijendra Pal* v. *State of U.P.*, 1975 ALJ 232). If there was no criminality, but only a civil liability, the debt cannot be said to be immoral. Where the taking of the money was not a criminal act, the subsequent appropriation of it will not make the liability immoral (*Sri Venkateswar Temple* v. *Radha Krishna* A 1963 AP 425 FB). "Immoral" means repugnant to good morals and that the liability of a Hindu father who was Managing Director of a Cooperative Bank, incurred as a result of negligence of his duties was not an immoral debt (*S.M. Jakati* v. *S.M. Brorkar*, A 1959 SC 282).

An offer is sometimes made that if any portion of the consideration for the

(*or*, to raise money for drinking purposes, *or* for expenses incurred by the said defendant No.2 in maintaining at Agra, a mistress, by name Smt. Putli).

7. The defendant No.3 was, at the time of his auction purchase of the said property, aware of the facts alleged in para 6 above.

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alienation is found to be binding, the plaintiff is ready to repay that amount. It is not strictly necessary to make this offer, for the court can always grant whatever relief it thinks equitable and proper (*Ganakapati* v. *Ganakapati*, 37 M 275, 17 IC 508). If any part of the consideration is found not to be binding, the transfer is generally set aside on plaintiff's paying back the amount (with interest, if necessary), but if this part is insignificant in comparison with that for which the necessity is proved, the transaction will be upheld (see footnote (c) above). This rule does not, however, apply to mortgages, as only so much money could be borrowed as was really needed (*Misrilal* v. *Bhawani Pd.*, 8 OWN 1002, 134 IC 1809). Where the sale is void for want of legal necessity and for inadequacy of consideration no question of giving any equities to the vendee arises even if some amount paid by him to some creditors of the vendors be genuine (*Prasad* v. *Govindaswami*, (1982) 1 SCC 185 (para 56), A 1982 SC 84).

It is not necessary to allege in the plaint that the transferor was not competent to transfer the family property or the transfer is legally void and plaintiffs have a right to have it set aside, as all these being matters of law, should have no place in a pleading.

Mesne Profits: See note (c) above.,

Limitation: Twelve years from the time when the transferee takes possession (Article 65 or 109; See *Ganpate* v. *Ramachandra*, A 1985 Kam 143). If the suit is for mere declaration that the alienation is null and void, Article 58 would apply (three years).

Defence: In such cases the transferee may plead (i) that the plaintiff was born after the transfer and the transfer was made with the consent of the members then in existence; or (ii) that the property was the self-acquired property of the transferor; or (iii) that the defendant had made inquiries into the necessity for the transfer and had advanced money because he was satisfied, as a result of such inquiries, that the money was needed for a family necessity (though necessity is after wards found not to have really existed as in such a case the alienee is not bound to see the application of the money. *Atma Ram* v. *Sadhu*, 1938 ALJ 190, 172 IC 1004, A 1938 PC 77, 40 BLR 742), or (iv) that the transfer was justified by legal necessity; or (v) that the transfer was made in lieu of antecedent debts of the father or manager, in the latter case adding that the manager's debt was also taken for a family necessity. Pleas (iii) and (iv) may be taken in the alternative. Particulars of the necessity and the antecedent debts alleged by the defendant must be given in the written statement and it is not enough to state simply that there was legal necessity or an antecedent debt. If the transfer impeached is not of the father, but of another member, and the

The plaintiffs claim :

(1) That the said mortgage and the said decree and sale be declared to be null and void.

(2) Recovery of possession of the said property.

No. 253—Suit of Setting Aside a Sale in Execution of a Simple Money Decree against the Father *(g)*

1. The plaintiff and his father Satya Narayan are, and have always been, members of a joint Hindu family governed by the Mitakshara law of the Benares school.

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plaintiff has not admitted in the plaint that the latter was the manager of the family, the transferee must not omit to plead that the transferor was the manager of the family, because if he does not plead that, a mere plea of legal necessity will not justify the transaction. If the father has transferred only his share, the defendant may take an alternative plea that the father was separate from the plaintiff. Where the plaintiff relies on the immorality of the debt which was discharged by the money raised on the mortgage, transferee can succeed on proving that they had made reasonable inquiries and acted *bona fide* (*Periaswami* v *Vaidhilingam*, A 1937 Mad 718).

Even if the suit is brought after the death of the father, the defendant cannot make a claim for refund of the price paid to the father, on the ground of pious duty of the plaintiff to pay his father's debts as the price does not become a debt until the sale is set aside. The defendant can, however, in case sale is set aside bring a separate suit for recovery of price paid by him to the father as debt of the father (*Madan Gopal* v. *Sati Prasad*, 15 ALJ 425, 40 IC 451, 39 A 485; *Raghunath Prasad* v. *Rambharose*, 100 IC 745 A).

In a suit in which the plaintiff can succeed only on proof of immorality or illegality of the debt, all that the defendant need plead is a denial of the plaintiff's allegation of immorality or illegality of the debt; the necessity for which the debt was borrowed need not be specified in the written statement though evidence of it may be necessary to rebut the plaintiff's case. If however, the same is specified, the pleading is not objectionable. It has been held in Lahore and Nagpur that if the defendant proves that the plaintiff is merely a figurehead and the real plaintiff is the alienor himself who has caused the suit to be instituted for the purpose of undoing his act, the court should refuse to declare the invalidity of the alienation (*Dad* v. *Lal*, 82 IC 626, 5 Lah 389, A 1925 Lah 24 DB, 6 Lah LJ 334, *Gangabai* v. *Hansadas*, 103 IC 905, A 1927 Nag 213, 10 NLJ 64).

Propositions of law, e.g., that the mortgage is binding on the plaintiff, or that the plaintiff cannot question the acts of his father need not be stated in the written statement.

(g) A judgment-creditor of a father can sell the whole joint family property,

2. The property described below was the joint property of the said family.

Description of the Property

* * * * *

3. In execution of a simple money decree against the said Satya Narayan, one Sobharam attached and sold the said property, and the defendant purchased it on November 14, 1984 but has not obtained possession (*or*, and obtained possession on January 20, 1985).

4. The bond, on the basis of which the said decree was passed was executed by the said Satya Narayan to pay the losses which he had incurred in speculating on the price of wheat with the said Sobharam during the seasons of 1980 and 1981. The losses on the said wheat transaction amounted to Rs.5,690 for the season of 1980 and to Rs.4,390 for the season of 1981.

5. The defendant was, at the time of his auction-purchase, aware of the facts alleged in para 4 above.

The plaintiff claims:

(1) A declaration that the said auction sale is null and void against the plaintiff and that the defendant is not entitled to any portion of the said property under the said sale; and

(2) Recovery of possession of the said property.

No. 254—Suit for Setting Aside an Alienation by One Member of a Family *(h)*

1. The three plaintiffs and defendant No.2 are brothers and form

and the sons cannot object to it, unless they prove that the debt was immoral or illegal, and that the auction-purchaser was aware of the fact, but other members of the family, e.g., nephews or brothers of the judgment-debtor can have their shares released simply on showing that they were not parties to the decree. The latter may simply show that they have got a share in the property and that they were not parties to the decree. The former must further not only allege that the debt was illegal or immoral but should also give full particulars of the alleged illegality or immorality. In such cases the plaintiff can recover his own share in the property and not the whole property as in the case of a mortgage.

Limitation: For declaration, 3 years (Article 58) and for possession 12 years (Article 65 or 109).

(h) As to the capacity of one member to alienate family property or any part

and have always formed, joint Hindu family governed by the Mitaskhara law of the Benares school.

2. The house described below is the ancestral property of the plaintiffs and defendant No.2.

3. By the sale-deed, dated February 14, 1985 defendant No.2 purported to sell the said house to defendant No.1.

The plaintiffs claim:

(1) A declaration that the said sale is void, and recovery of possession of the said house.

(2) *Or*, in the alternative, if defendant No.2 be found to be separate from the plaintiffs, recovery of plaintiffs' 3/4th share in the said house.

No. 255—Suit by a Wife against her Husband for Maintenance *(i)*

1. The plaintiff was married to the defendant in 1978 and is still the wife of the defendant.

2. On November 14, 1993 the defendant took a mistress one Smt. Ramo, and thereafter began to beat the plaintiff and confine her in a room for days together, without giving her food, and has, on January 6, 1994, without any justification turned her out of his house, and threatened that if she attempted to return, he would kill her.

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of it, see note *(f) ante*. This form of action may be used even if the transferor was the manager. Let the defendant transferee allege that the transferor was the manager and the facts justifying the transfer. If, however, it is admitted in the plaint that the transferor was the manager, it should be alleged that the transfer was made without a legal necessity. If the transferor has described himself in the deed of transfer as a manager and that fact is intended to be denied it is better to deny it in the plaint thus : "The said defendant No. 2 is not the manager of the said joint family." But it must be remembered that the mere omission of the transferor to describe himself in the deed as manager would not prevent the transferee from showing that he was the manager and competent to transfer (*Chhajju Mal* v. *Multan Singh*, A 1936 Lah 996). If the suit is brought for declaration that the alienation is void to the extent of plaintiff's share, the extent of such share should be determined with reference to the date of suit (*Viswesara Rao* v. *Varahanarasimham*, A 1937 Mad 631).

(i) Ordinarily a wife's place is with her husband and she is not entitled to live apart from him and claim maintenance (*Nagamma* v. *Rajiya*, 110 IC 30, A 1928 PC 187, 48 CLJ 17; *Laxmi* v. *Maheshwar*, A 1985 Ori 11). The Hindu Adoptions and Maintenance Act (78 of 1956), section 18 (2), however, entitles a wife to live

3. The defendant is a big landlord having house property yeilding a net income of about Rs.94,000 per mensem and having regard to the position of the parties and the needs of the plaintiff, the plaintiff claims Rs.21,000 per month as her maintenance.

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separate from her husband without forfeiting her claim to maintenance if and only if (a) he is guilty of desertion, i.e. of abandoning her without reasonable cause and without her consent or against her wish or of wilfully neglecting her; or (b) he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with him; or (c) if he is suffering from a virulent type of leprosy; or (d) he has any other wife living; or (e) he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere; or (f) he has ceased to be Hindu by conversion to another religion; or (g) there is any other cause justifying her living separately. But she is not entitled to maintenance while living separate from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion. **In a suit for maintenance, therefore, she should allege in the plaint the grounds on which she claims right to live separately and the amount she claims.** Such amount is generally fixed in accordance with the position and status of the husband and the needs of the wife, and these should be alleged in the plaint. She should be enabled to live consistently with her position as the wife of her husband with the same degree of comfort and reasonable luxury (*Gajendra Nath* v. *Sulochana*, 68 CLJ 559).

Where property is acquired by a Hindu female in lieu of right of maintenance on or before the commencement of the Hindu Succession Act, it shall be held by her as full and absolute owner (*Nazar Singh* v. *Jagjit Singh*, (1996) (27) ALR 106 (SC).

The plaintiff may, if she likes, also ask for a charge on the property belonging to her husband (*Annappa Bilappa* v. *Malabai Annappa Shirhatti*, (1976) 78 BLR 539). But as the husband is liable personally, independently of the fact whether he has any property or not, no charge attaches to his property until it is attached by a decree; therefore, if the husband transfers his property pending a suit by the wife, the transfer is not void under section 52, Transfer of Property Act. The case of the widow's suit against the husband's relations is different as in that case the right of the widow is dependant on the existence of the property in the hands of the relations (*Paruchuri* v. *Surugutchi*, 101 IC 806, 52 MLJ 520, 1927 MWN 314), while husband's liability is not dependant on possession of property (*Radhabai* v. *Gopal*, A 1944 Bom 50; *Satayanarain Murthy* v. *Ram Subbamma*, (1963) 2 An. WR 400).

The suit against husband may be brought at the place where marriage was performed (*Chandrawati* v. *Suraj Narain*, A 1955 All 387). If after obtaining a decree, she resumes cohabitation with the husband the decree becomes ineffective and cannot be executed (*Venkayya* v. *Raghavamma*, 1941 MWN 978). Ordinarily maintenance is granted from the date of suit, but if demand was made for before, arrears from date of demand should be granted (*Pallamreddy Andema* v. *Varadareddy*, A 1949 Mad 31, 1948 MWN 224, (1948) 1 MLJ 30). In suit based on

The plaintiff claims:

(1) A decree fixing Rs.21,000 per month as the plaintiff's maintenance and directing the defendant regularly to pay the same to the plaintiff.

(2) Rs.42,000 for arrears of maintenance, at Rs.21,000 a month, for the period the plaintiff has been living separately from the defendant.

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the ground of husband marrying another woman, maintenance can be awarded from date of second marriage.

The right of wife under section 18 Hindu Adoptions & Maintenance Act, 1956 is not a right only for future maintenance but for past maintenance also, subject to law of limitation. Such a right for past maintenance is not affected by an order of maintenance *pendente lite* passed under section 24 of the Hindu Marriage Act (*Shakuntalabai Sahabrao Pawar* v. *Sahabrao Rambhau Pawar*, 1976 Mah LJ 512). An order for payment of interim maintenance can also be passed on proof of *prima facie* case during the pendency of a suit for maintenance (*Jadumani* v. *Kumudini*, A 1986 Ori 10).

If the maintenance claimed is not more than Rs. 500 a month, and the wife has no private means to maintain herself, it is sometimes more convenient to have recourse to the Criminal Court under section 125, Cr. P.C. But an order under that section is no bar to a suit for more maintenance than that awarded by the magistrate.

Defence : In such cases the defendant may charge the wife with unchastity or may show that the reasons alleged by her for living separate from him are not sufficient. The amount may also be contested. Unchastity will disentitle a wife even to maintenance due under a bond executed by the husband (*Sita Devi* v. *Gopal Saran Narayan Singh*, 111 IC 762, A 1928 Pat 375 DB). An offer to take the wife back is a good defence unless the wife can show sufficient grounds justifying her refusal. Such grounds would be the same as would be sufficient to justify the refusal of restitution of conjugal rights to the husband (*Venkatapathi* v. *Puttamma*, 165 IC 314, A 1936 Mad 609).

Limitation for a suit under the Hindu Law for declaration of right of maintenance and fixing the amount of maintenance is 3 years from the time the right is denied (Article 58), and for arrears of maintenance after maintenance has been fixed is 3 years from the date when the amount is payable (Article 105). When maintenance is not claimed under Hindu Law, the suit for declaration will be governed by Artcile 58 and in respect of arrears by Article 113. If maintenance is claimed under a contract, Article 55 will govern the suit.

No. 256—Suit by a Widow against the Husband's Brothers for Maintenance (j)

Omitted

MOHAMMEDAN LAW

No. 257—Suit of Divorce on Ground of Husband's Impotence *(k)*

1. The parties are Mohammedans.

2. The plaintiff was married to the defendant on April 6, 1995 and thereafter the parties resided together at the defendant's house until September 10, 1995 when the plaintiff returned to the house of her father.

3. The defendant was, at the time of the said marriage, impotent and is still impotent, and has not, and cannot, consummate the said marriage.

4. The plaintiff was, on the said April 6, 1995 wholly unaware of the impotency of the defendant.

The plaintiff claims dissolution of her marriage with the defendant.

(j) This precedent related to a case where the widow's husband died before the commencement of the Hindu Women's Right to Property Act, 1937 and has therefore been omitted as no longer of any practical utility. Where the death takes place after the coming into force of the Act, the widow will inherit a share in her husband's separate as well as coparcenary property and cannot claim maintenance. If the husband leaves no property and the widow has no property of her own nor has any other earnings she can now under the Hindu Adoptions and Maintenance Act of 1956 sue her son (natural or adopted) or her daughter for maintenance. It has been held that section 22 (2) of the Act is an exception to section 22 (1), and the widow who has a right to a share in the property of her father-in-law has no right to claim maintenance from her husbands's brothers (*Jai Lal* v. *Smt. Dulari*, 1976 ALJ 641). If she is a childless widow she can sue her step-son. If the widow happens to be a minor she can, during her minority, claim maintenance from her parents also. If she is unable to obtain maintenance from any one of the aforesaid persons she may claim it from her father-in-law. But this obligation shall not be enforceable if the father-in-law has not the means to meet it from any coparcenary property in his possession out of which the daughter-in-law has not obtained any share. Widow's claim for maintenance against all above-mentioned persons shall cease if she re-marries or ceases to be Hindu. There is no charge on the property unless one is created by decree or agreement (*Jamnabai* v. *Balakrishna*, 102 IC 104, 53 MLJ 176; *Mohini* v. *Purna*, 30 CWN. 153, 55 CLJ 198, A 1932 Cal 451; see also *Ramarayudu* v. *Sitalakshmammu*, A 1937 Mad 915 : in which a charge on her husband's share

No. 258—Suit for Divorce on Ground of *La'an*

1. The parties are Mohammedans.

2. The plaintiff was, on November 14, 1988 married to the defendant and is still wife of the defendant.

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was maintained). If there is no such property, the widow has no right to be mantained by any relation except that there is a moral (but not legal) duty of the father-in-law to maintain her out of his separate property, but on his death the heirs who take that property become legally bound to maintain her (*Ethirajamma* v. *Subbarayudeu*, 1938 NWM 1135; *Jagmohan* v. *Smt. Jiana*, 1979 AWC 695). An alienee from such an heir is bound to maintain her if the condition specified in section 28 are satisfied (*Parul Bala Desai* v. *Bangshedhar Nandi*, A 1971 Cal 270). The donees or devisees, however, are not so bound (*Sankarmurthy* v. *Subbamma*, 1938 MWN 922, A 1928 Mad 914). Even a permanent concubine, whose connection with the deceased was an open one and who resided permanently and openly as a member of the family is entitled to maintenance (*Bai Nagubai* v. *Bai Monghabai*, 96 IC 20), but she must be a Hindu. A Mohammedan mistress is not so entitled (*Haidri* v. *Nariandra*, 13 OLJ 245, A 1926 Oudh 294, 93 IC 767, 3 OWN 284).

A suit may be brought either for declaration of the amount of maintenance or for arrears of maintenance, or for declaration of charge for maintenance on the husband's property. The last-mentioned relief is particularly necessary where there is a danger of the property being transferred by the heirs of her husband. It has been held that in such a case she would be able to realise her future maintenance by execution of the decree, and cannot be driven to a separate suit for sale of the property charged (*Indramani* v. *Surendra*, 64 IC 852, 35 CLJ 61, A 1922 Cal 35 DB; *Radhakrishna* v. *Bachni*, A 1937 Pat 654, 172 IC 234). In such a suit **the plaintiff must allege her right and the amount she claims and facts showing defendant's liability. The property to be charged must be specified. In a suit for arrears, it should be alleged that the maintenance was wrongfully withheld by the defendant** (*Sheshama* v. *Sabbaravadu*, 18 M 403), as mere non-payment may be due to the plaintiff not needing it as when she comfortably lives with her parents. No previous demand is however necessary (*Panchakshara* v. *Pattammal*, 39 MLT 32, A 1927 Mad 865; *Parwatibai* v. *Chatru*, 39 B 131; *Ramarayuda* v. *Sitalakshmammu*, A 1937 Mad 915).

The amount of maintenance will be fixed with regard to the income of the family property and the position and status of the plaintiff, but cannot be more than the income of her husbnad's share in the property. Even the income of property subsequently acquired by the joint family should be taken into account (*Chunilal* v. *Bai Saraswati*, A 1943 Bom 393). The general principle is that the sum awarded must enable the lady to live consistently with the position of a widow in something like the degree of comfort and with the same reasonable luxury of life which she enjoyed in her husband's lifetime (*Mt. Ekradedwari* v. *Homeshwar*, 56 IA 182, 8 Pat 840, 27 ALJ 695, 31 BLR 816, 49 CLJ 579, 116 IC 409, A 1929 PC 128, 27 MLJ 50). The

3. On January 14, 1994 the defendant filed a complaint before the Sub-Divisional Magistrate of Gaya against one Mohammad Hashim under section 498, Indian Penal Code for having enticed away the plaintiff, and in the complaint he falsely charged the plaintiff with having committed adultery, and made the following false statement regarding the plaintiff :

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widow's income from separate property cannot be taken into consideration (*Annapooranma* v. *Veeraraghav*, A 1940 Mad 547; *Nunevarahalu* v. *Nunesithamma*, A 1961 AP 272 FB). The amount of maintenance includes residence or the cost thereof and a widow is not therefore entitled to maintenance equal to her husband's share in joint family property, plus residence (*Kewalmal* v. *Isribai*, A 1926 Sindh 135, 93 IC 353 DB; *Padibai* v. *Manglomal*, A 1940 Sindh 188). Maintenance fixed by agreement or decree can be enhanced or reduced on a proper case being made out for change due to change in the circumstances (*Chinnamal* v. *Venkatasami*, 101 IC 752 M; *Sansar Chand* v. *Shanti*, 96 IC 255 L; *Ram Pal Singh* v. *Lal Surendra B. Singh*, 166 IC 194, A 1937 Oudh 82; *Indira Bai* v. *B.A. Patel*, A 1974 AP 303), except when the terms of the agreement expressly and definitely lays down that no change would be made (*Kameshwaramma* v. *Thammanera*, A 1939 Mad 798; *Trimbak* v. *Mst. Bhagubai*, A 1939 Nag 249). But where the circumstances are such that a claim for increase should be considered to have been waived a suit for increase would not lie, e.g., when the husband and wife agreed to live apart, the husband agreeing to pay to the wife the income of a certian property as maintenance and the wife agreeing not to claim maintenance from any other property, she cannot after his death, sue the executors for increased maintenance from other property (*Purshotamdas* v. *Rukshamani*, 170 IC 897, A 1937 Bom 358). The amount is not to be varied on every fluctuation in the income, but only on a permanent increase or decrease (*Maheshwari Prasad* v. *Sahdei*, 165 IC 227, 1936 OWN 902). Any personal income made by the widow by her own exertions will not justify reduction (*Bai Jaya* v. *Ganpatram*, A 1941 Bom 305, 196 IC 607). The increase can be effected from the date of order and not in respect of past arrears (*Trimbak* v. *Mst. Bhagubai*, A 1939 Nag 249; *Savitribai* v. *Radha Kishan*, A 1948 Nag 44).

Limitation for suit for arrears of maintenance is 3 years under Article 105 of the Act of 1963.

Defence : The plaintiff's unchastity used to be a complete defence but it is not so if the suit is not under Hindu law but under an agreement (*Shivalal* v. *Bhai Sankli*, 35 BLR 490, 132 IC 444, A 1931 Bom 297; *Bhuep Singh* v. *Lachman Kr.*, 26 A 321; contra *Kishanji* v. *Laksimi*, 33 BLR 510, A 1931 Bom 286, which is single Judge case), or if it is under the Hindu Adoption and Maintenance Act of 1956.

If, however, a widow, though at first unchaste, has given up that life and leads a moral life, she will be entitled to *bare* maintenance, i.e., just sufficient for her living (*Bhikubai* v. *Hariba*, 49 B 459, 27 BLR 13, A 1925 Bom 153 DB, 94 IC 655; see *Mh. Shibi* v. *Jodh Singh*, A 1933 Lah 747). The defendants cannot compel the

"My wife Mst. Shakuran had illicit connection with the accused person before she ran away and she has committed adultery with the accused person."

The plaintiff claims that her marriage with the defendant be dissolved.

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plaintiff to live with them, unless the husband's will contains any such condition (*Girianna* v. *Honarma* 15, B 236; *Tincouri* v. *Krishna*, 20 C 15), and her refusal to live with the defendants is no ground for reducing maintenance (*Bhairon* v. *Ram Sewak*, 107 IC 552, A 1928 Oudh 1). Even such a direction in the husband's will can be ignored for just cause (*Jamuna Kunwar* v. *Arjun Singh*, 1940 ALJ 750). In a suit for arrears, defendant may show a waiver or abandonment. The fact that the widow has separate private funds which also yield an income is irrelevant if the income of the joint family property is sufficient for the maintenance of all members (*Khodandarani* v. *Chenchamma*, A 1930 Mad 479, *Jai Ram* v. *Shiva Dei*, A 1938 Lah 344, 177 IC 539). So also the fact that she has received some property under her husband's will, if that property is insufficient (*Kanakshi* v. *Krishnammal*, 1938 MWN 64, (1938) 1 MLJ 252, 47 LW 146, A 1938 Mad 240, 177 IC 688). So also the fact that she has a right to a share in the non-agricultural property of her husband under the Hindu Women's Right to Property Act (*T. Sarojini* v. *T. Sri Krishna*, A 1944 Mad 401). But the fact that she has got ornaments (which are her *stridhan*) of great value which are of no use to her and which she can dispose of can be taken into account (*Gurushiddappa* v. *Parwatewwa* 167 IC 973, A 1937 Bom 135). That the joint property has been sold away is no defence, unless the sale was made for a family purpose which has priority to the maintenance, otherwise the coparcener will be personally liable to the extent of the joint family property sold away by him (*Chunilal* v. *Bai Saraswati*, A 1943 Bom 393).

The fact that in the life time of the husband the widow has refused to obey a decree for restitution of conjugal rights passed against her is no defence (*Perimbal* v. *Sundrammal*, A 1945 Mad 193, 220 IC 334).

(k) Such a suit at the instance of the husband is unnecessary as the husband can very easily divorce the wife by pronouncing the divorce and no assistance of the court is required. A wife may obtain dissolution of marriage by mutual agreement with her husband, but under the Hanafi law she could not claim a divorce through court, except (1) on the ground of impotence of the husband, or (2) on the ground of *la'an*. The Muslim law in this respect has been modified by the Dissolution of Muslim Marriages Act, 1939, section 2 of which provides that a woman may obtain a decree for dissolution of marriage on seven other grounds, namely : (i) that the whereabouts of the husband have not been known for a period of four years; (ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years; (iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards; (iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years; (v) that the husband has been insane for a period of two years or is

No. 259—Suit by a Mohammedan Heir for Possession against a Widow, with Alternative offer to Pay Dower Debt

1. One Muhammad Ali was the owner of the property detailed at the foot of the plaint.

2. The said Muhammad Ali, died in August 1991 leaving behind him Hamid Ali, his brother, and the defendant, his widow, as his only legal heirs and thus Hamid Ali inherited 144 out of 192 *sihams* out of the said property.

3. The said Hamid Ali died on September 4, 1993 leaving the plaintiff, a son, Mst. Kulsum, a widow and Mst.Hajra a daughter, as his only heirs and the plaintiff thus inherited 84 *sihams* and Mst. Kulsum inherited 18 sihams out of the 144 *sihams* of the said Hamid Ali in the said property.

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suffering from leprosy or a virulent venereal disease; (iv) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years: provided that the marriage has not been consummated; (vii) that the husband treats her with cruelty, that is to say—

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical illtreatment; or

(b) associates with women of evil repute or leads an infamous life; or

(c) attempts to force her to lead an immoral life; or

(d) disposes off her property or prevents her exercising her legal right over it, or

(e) obstructs her in the observance of her religious profession or practice; or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the *Quran*.

If a Mohammedan wife stays away from husband without any justifiable grounds, she is not entitled to dissolution of marriage (*Mst. Mobiya Khatun* v. *Shri Anwar Ali*, A 1971 Cal 218). If the husband is impotent and unable to discharge his marital obligations, this is a very just ground for the wife for refusing to live with him and to claim maintenance (*Sirajmahemedkhan Jan Mohamad Khan* v. *Hafizunnissa Yasinkhan*, A 1981 SC 1972, 1981 Cr. LJ 1430 SC). The courts construe the Act in a liberal spirit in favour of the wife (*Sofia Begum* v. *S. Zaheer Hassan*, 1947 ALJ 157; *Abbas Ali* v. *Rabia Bibi*, A 1952 All 145).

The specific ground on which dissolution is claimed must be alleged in the plaint with full particulars.

When dissolution is claimed on the ground of husband's impotency, the

4. The said Mst. Kulsum died in November 1994, leaving the plaintiff, a son, Mst. Hajra, a daughter, and Mst. Bano, mother, and the plaintiff thus inherited 10 out of 18 Sihams of the said Mst. Kulsum in the said property.

5. The plaintiff is thus now owner of 94 *sihams* of 192 sihams in the said property.

6. In reply to a notice sent by the plaintiff to the defendant and the latter has, by a letter dated June 4, 1993 asserted a claim to possession of the said property in lieu of her alleged dower debt of Rs.10,000.

7. The defendant's dower was verbally agreed at the time of her marriage, to be only Rs.2,000.

8. The defendant verbally relinquished her dower debt in the presence of the said Muhammad Ali a few hours before his death.

9. Alternatively, the said dower debt has been satisfied by the usufruct of the said property.

The plaintiff claims:

(1) Possession of 94 out of 192 *sihams* in the said property.

(2) Rs.294 on account of the three year mesne profits in respect of the said share as per account given below.

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court should if the husband applies to that effect, postpone the case for one year and dissolve the marriage only if the infirmity continues at the end of the year. Unless the husband makes an application for such an order a final decree can be passed forthwith. A decree on ground No.(i) does not take effect for a period of six months and if within this period the husband appears and is prepared to perform his conjugal duties, the decree is set aside. If a divorce is claimed on ground (ii) it is not necessary to show that the default is wilful. It is immaterial whether the default was due to poverty, loss of work, failing health or imprisonment or any other cause *(Manak Khan* v. *Mt. Malkhan*, A 1941 Lah 167, 194 IC 567).

If a husband neglected a wife for 10 years, and during the last 2 years was made to pay maintenance money under order of a magistrate, wife can base her suit on the ground of neglect prior to those 2 years *(Asoma Bai* v. *Umar Mahomed*, A 1941 Sindh 28, 193 IC 847). The word neglect in section 2 (ii) implies wilful failure and the words 'has failed to provide' imply omission of duty; consequently, where the wife through her own conduct led the husband to stop maintenance, the court would not allow dissolution of marriage (*Mt. Badrulnisa Bibi* v. *Md. Yusuf*, A 1944 All 23; *Zafar Hussain* v. *Akbar Begum*, A 1944 Lah 236).

In a suit on the ground of *la'an*, **the plaintiff must allege the particulars of the imputation of adultery made by the defendant,** i.e, when, and on what occasion,

In the alternative,

(1) that an account be taken from the defendant of the profits which she has realised from the said property from the date of her possession up to date;

(2) if any surplus is found in the defendant's hands after satisfaction of her dower debt, possession of 94 out of 192 sihams in the said property, with proportionate share out of the said surplus; and

(3) If any portion of the dower debt is found to be still due to the defendant, possession of 94 out of 192 sihams in the said property conditional on the plaintiff paying his proportionate share out of the said portion of the dower debt.

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it was made, whether verbally or in writing and in the latter case, the writing should be identified. The exact words of the charge had better be quoted. Though the more reasonable view would be as held in *Khatijabi* v. *Umar Shah*, 52 B 295, 110 IC 131, A 1928 Bom 285 DB, that only false imputation would give a right to the wife to claim divorce, yet, according to the orthodox Muhammedan Law, there is no such restriction and any imputation (whether true or false) would entitle the wife to claim divorce (See Wilson's Anglo-Mohammedan Law). In the case of *Md. Husain* v. *Begum Jan*, 93 IC 1017, a decree was passed on the ground of an accusation without proof that it was false because the High Court considered that in the circumstances it was impossible to prove that it was true. They did not commit themselves to the proposition that even a true charge gives the wife a right to claim divorce. If the charge is that a third person enticed away the woman and committed adultery without her consent, there is no charge against her.

Limitation: 3 years under Article 113. When dissolution is claimed on the ground of impotency advantage of section 22 can be taken as the cause of action is continuous (*Mt. Sahibzadi* v. *Abdul Ghafoor*, A 1939 Lah 454).

Defence: There is ordinarily no defence except denial of the allegations. A suit on the ground of impotency may be defended on the ground that the infirmity is not permanent, but is temporary. In the case of a suit on the ground of *la'an* a retraction is a good defence (*Tufail Ahmad* v. *Jamila Khatun*, A 1962 All 570), but it must be unqualified retraction of the accusation by admitting that it was false, and should be made in the begining of the trial. A qualified retraction made or one made at the end of trial was held to be insufficient (*Abdul Ghani* v. *Nanhi*, 24 ALJ 88; *Abdul Rahman* v. *Mt. Shah Bibi*, 118 IC 680, A 1929 Nag 262; *Shamsannessa* v. *Mir Abdul*, 70 CLJ 289, 186 IC 605; *Saju* v. *Mujsed*, 45 CWN 122).

RESTITUTION OF CONJUGAL RIGHTS

No. 260—Suit for Restitution of Conjugal Rights *(1)*

1. The defendant was married to the plaintiff on November 18, 1988 and is still the wife of the plaintiff.

2. The defendant has, in February, 1994 deserted the plaintiff and lives at her father's place, and without any lawful excuse refuses to come to the plaintiff's house.

The plaintiff claims a decree directing the defendant to live with the plaintiff and to allow the plaintiff a free exercise of his conjugal rights with the defendant.

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(1) In such suits **it is necessary to allege the marriage and, if denied, to prove it strictly. The fact that the defendant had deserted the plaintiff should be alleged** (*Lalitagar* v. *Bai Suraj* 18 B 316).

In a Burma case, it was held that before the suit there should be a demand in a conciliatory form (*Ezra* v. *Ezra*, 51 IC 65, 12 Bur LT 120), but in case of Mohammedans this is not necessary (*Binda* v *Kunsilia*, 13 A 126). Such cases are usually instituted by husbands against wives, though, there is nothing in the Mohammedan Law to prevent a wife from instituting a similar suit against the husband, and, in fact, O. 21, R. 33, contemplates the possiblility of such suits. In execution of a decree for conjugal rights the wife cannot be sent to jail, and both the passing and the enforcement of such decrees are entirely within the discretion of the court (*Mohammad* v. *Mst. Saeeda Amina Begum*, (1976) 1 Karn LJ 427, A 1976 Karn 200). A wife cannot be compelled to live with husband if her life is apprehended to be in danger (*Shakila Banu* v. *Gulam Mustafa*, A 1971 Bom 166).

Sometimes it so happens that the relatives of the wife also prevent her from going to her husband. In such cases, an injunction may be claimed against them, but unless it is proved that they are responsible for her not going to the plaintiff, an injunction cannot be granted, and, when granted it will not be to restrain the parents from harbouring her, but to restrain them from preventing her from going to the plaintiff *(Bai Jamma* v. *Dayali*, 44 C 544, 57 IC 571).

Forum : Petitions for restitution of conjugal rights under the Divorce Act (for Christians) or the Hindu Marriage Act, 1955, can only be instituted in forum provided under those Acts (See precedents and notes under "Miscellaneous Applications" *post*), while suits by Muslims can be instituted in the court competent under sections 15 and 20, C.P.C.

Limitation : 3 years under Article 113 but section 22 applies and therefore, such a suit is practically never barred.

Defence: Besides denial of marriage, the defendant wife may successfully plead physical or legal cruelty of the husband as a justification of refusal to go to

No. 261—Suit for Restitution of Conjugal Right with a Prayer for Injunction against the Relatives of the Wife

1. Defendant No.1 is the wife of the plaintiff, and defendant No.2 is the father, and defendant No.3 is the mother of defendant No.1.

2. Defendant Nos.2 and 3 had called defendant No.1 to their house in October, 1994. Since then defendants Nos.2 and 3 have been preventing defendant No.1 from coming to the plaintiff and defendant No.1 now refuses to come to the plaintiff's house.

The plaintiff claims :

(1) A decree directing the defendant to live with the plaintiff and to allow him a free exercise of his conjugal rights.

(2) An injunction restraining defendant Nos.2 and 3 from preventing defendant No.1 from coming to the plaintiff's house.

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the plaintiff. **Full fact of the alleged cruelty must be laid before the court.** Mere disagreement between the familes of the parties is no defence (*Bajid* v. *Satto*, 48 IC 231 Punj) nor petty quarrels between the husband and wife, nor the ill health of the wife (*Kuppannimal* v. *Kuppanana Chari*, 24 IC 380, 26 MLJ 361). But something short of even legal cruelty may in certain cases amount to a good defence as the court has to find from all the circumstances whether it is a proper case in which to pass a decree (*Dular Koer* v. *Dwarkanath*, 34 C 971). It has been held that a false accusation of adultery made by a husband amounts to legal cruelty (*Maqbulan* v. *Ramzan*, 4 OWN 247, 101 IC 261, A 1927 Oudh 154, 2 Luck 482 DB). False allegation by husband that wife has married again, amounts to legal cruelty (*Mohinder Kaur* v. *Bhag Ram*, A 1979 Punj 71). Beatings at irregular intervals extending over a considerable period as a result of which the wife is in a condition of mental anxiety, apprehension and unhappiness, furnish a good defence (*Tanni* v. *Kallu*, 25 ALJ 1100; *Mt. Sofia* v. *Syed Zahir Hasan*, A 1947 All 16, 1947 ALJ 157). Habitual nagging of wife by husband's parents is also a good defence (*Ravindra Nath* v. *Pramila Bala*, A 1979 Orissa 85).

Insanity, leprosy, and venereal disease of the husband have been held to be good defences under the Hindu Law (*Binda* v. *Kaunsilia*, 13 A 126; *Yamuna* v. *Narayan*, 1 B 264), but not impotence of the defendant (*Purshotam* v. *Mani*, 21 B 610). Even impotence not known to the wife at the time of marriage may be a defence under the Mohammedan Law, as that is a good ground for annulment of marriage. Sodomy or beastiality may also be a good defence under any law. Non payment of prompt dower is no defence according to the Allahabad High Court (*Hijaban* v. *Ali Sher*, 19 ALJ 880), but according to Bombay High Court this will be a defence in the sense that a decree conditional on payment of dower will be passed, but if the marriage has been consummated non-payment of dower will in no case be a defence

No. 262—INTERPLEADER SUIT *(m)*

1. On June 15, 1989, one Ramkishan, now deceased deposited with the plaintiff for safe custody, four G.P. Notes Rs.1,000 each (being Nos.___) and one box of jewellery.

2. The said Ramkishan died in 1992.

3. The defendant No.1 claims the said notes and box from the plaintiff as the adopted son of the said Ramkishan.

4. Defendant No.2 also claims the same from the plaintiff as the widow of the said Ramkishan and denies the adoption of defendant No.1.

5. The plaintiff is ignorant of the respective rights of the defendants.

6. The plaintiff has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such person as the court shall direct.

7. There is no collusion between the plaintiff and either of the two defendants.

The plaintiff claims:

(i) that the defendants be restrained by injunction from taking any proceeding against the plaintiff in relation to the said property;

(*Abdul* v. *Hussenbi*, 6 BLR 728; *Bai Honsa* v. *Abdulla*, 30 B 122; see also Mulla's Mahomedan Law [XVIII Edn] section 293). But courts have always discretion to grant the relief on any conditions they think proper, e.g., payment of dower (*Anis Begum* v *Malik Muhammad Itafa*, A 1933 All 634, 1933 ALJ 1079). That defendant is under 13 years of age, will be a good defence, as intercourse with a wife of that age is a criminal offence. It has been held that such a decree passed against a minor is a nullity (*Mathein* v. *Maungpa*, A 1937 Rang 226, 170 IC 532). An agreement by the plaintiff to allow the defendant to live separately from the plaintiff is void and can be no defence (*Abdul* v. *Hussenbi*, 6 BLR 728). Abandonment by a Hindu husband of his wife may be a good defence (*Sitabai* v. *Ram Chandra*, 12 BLR 373, 6 IC 525; *Baburam* v. *Mt. Kokla*, 22 ALJ 68, A 1924 All 391, 79 IC 634; *Bai Jur* v. *Nar Singh*, 101 IC 403, 29 BLR 332); gross failure to perform marriage obligations e.g., not caring to call the wife for ten years, not consummating marriage and marrying another wife and living with her, may be a ground for refusing a decree (*Imam Baksh* v. *Amiran*, 107 IC 607 L; *Jagram* v. *Lakshmi*, 1940 MWN 525). Long unexplained delay may be a ground for refusing the relief which is discretionary (*Mt. Bano* v. *Ghulam*, 165 IC 961, A 1936 Lah 752).

(m) Such suits cannot be brought by an agent or tenant against his principal

(ii) that they be required to interplead together concerning their claims to the said property and it may be declared which of the defendant is entitled to it;

Add if necessary, (iii) that the said property may be allowed to be deposited in court or some person may be authorised to receive the same pending this litigation ;

(iv) that upon delivery of the same to such person or deposing the same in court, the plaintiff be discharged from all liability to either of the defendants in relation thereto.

No. 263—Interpleader Suit

(Form No. 40, Appendix A, C.P.C.)

(Title)

AB, the above-named plaintiff, states as follows :

1. Before the date of the claims hereinafter mentioned, *GH* deposited with the plaintiff [*describe the property*] for [safe-keeping].

2. The defendant *CD* claims the same [under an alleged assignment thereof to him from *G H*].

3. The defendant *EF* also claims the same [under an order of *G H* transferring the same to him].

4. The plaintiff is ignorant of the respective rights of the defendants.

5. He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the court shall direct.

6. The suit is not brought by collusion with either of the defendants.

The plaintiff claims :

(1) That the defendants be restrained by injunction from taking any proceeding against the plaintiff in relation thereto;

(2) that the defendants may be required to interplead together concerning their claims to the said property;

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or landlord so as to compel him to interplead with any person claiming adversely to such principal or landlord (O. 35, R. 5); but a Railway company is not an agent for the purposes of this rule, (*Chaganlal* v. *B.B.& C.I. Ry.Co.*, 17 BLR 330). Requirements of a plaint are given in O.35, R. 1.

Limitation : 3 years under Article 113.

(3) that some person be authorised to receive the said property pending such litigation;

(4) that upon delivering the same to such [person], the plaintiff be discharged from all liability to either of the defendants in relation thereto.

PARTITION

No. 264—Suit for Partition of Joint Hindu Family Property *(n)*

1. The plaintiff and the defendants are members of a joint Hindu family and their relationship with each other will appear from the following pedigree :

Pedigree

* * * * *

Defence : Any defendant may plead that there is collusion between the plaintiff and the other defendants; or that he never preferred any claim to the property, or that he is the owner of the property.

(n) Such suit can be brought by any co-parcener or by a purchaser of the interest of any co-parcener. A minor co-parcener cannot however, bring a suit unless it is proved that partition would be for his benefit. He should, therefore, allege this in his plaint. Even if an agreement for partiton is entered into between the minor's father and his brother it cannot be enforced unless it is shown that it was fair and not injurious to minor's interest (*Kishan Lal* v. *Lachmichand*, 170 IC 577, A 1937 All 456). In view of the provisions of the Hindu Succession Act females can acquire absolute interest in the separate as well as coparcenary property of a deceased Hindu. As such they can claim partition. But an exception has been made in respect of a dwelling house in which they can claim a separate share only when male heirs choose to divide their respective shares. The dwelling house does not include a tenanted house (*Narshimah Murthy* v *Susheelabai*, A 1991 SC 1826).

In Punjab, as a matter of custom, a son cannot sue in the lifetime of his father (*Punjab National Bank* v. *Jagdish*, 163 IC 114, A 1936 Lah 390). According to the Gujrat and Bombay High Courts, a son cannot sue in the lifetime of his father if the latter is joint with his brothers or father. (*Aher Hamer Duda* v. *Aher Duda Arjan*, A 1978 Guj 10; *Apaji* v. *Ramchandra*, 16 Bom 29, FB), but this exception has not been accepted by other High Courts (Gupte's Hindu Law, III Edn., Article 41).

Parties : All coparceners, females who are legally entitled to a share, puchasers and mortgagees of the interests of coparceners, are necessary parties to a partition suit. Females entitled to a provision for their maintenance and marriage are also considered, by some, to be necessary. In any case, they are proper parties. A grandson is not a necessary party as his interest is represented by his father (*Thakur* v. *Sant Singh*, A 1933 Lah 465, 141 IC 567). In a suit for partition all the co-

2. The property detailed at the foot of the plaint is the property of the said joint family and the parties are in joint possession of the same. (*Or*, property entered in schedule A is in the possession of the plaintiff, that entered in schedule B is in possession of defendant No.1, and that entered in schedule C is in possession of defendant No.2).

3. The share of the plaintiff in the whole of the said property entered in the said three schedules is 1/4th. [*If the plaintiff is a minor, add an allegation about benefit*].

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sharers are plaintiffs and defendant, and in the absence of even one party, the suit cannot proceed (*Ram Mehar* v. *Surat Singh*, 1989 (1) HLR 625 (P&H); *Ramchandra Pillai A.* v. *Valliammal*, (1987) 100 LW 486 (Mad) (DB). Where division between two branches of a family is claimed, it is sufficient if the heads of those branches are parties and it is not necessary to join all coparceners (*Bishambar* v. *Kanshi*, 1 L 483, A 1932 Lah 641). In a suit by auction purchaser of the share of a coparcener, such coparcener is not a necessary party (*Delu Singh* v. *Jagdip*, A 1948 Pat 317; *Santosh Chandra* v. *Gyan Sunderbai*, 1974 MPLJ 679). A mortgagee of undivided share is a proper party as his security will, after partition, be upon divided share. If he has proceeded to a sale on his mortgage, the auction purchaser will be a necessary party (*Jadu Nata* v. *Parameshwar*, A 1940 PC 11, 185 IC 234).

The suit should embrace the whole coparcenary property, unless any portion is not immediately available for partition or where it is held jointly by the family with a stranger (*Purshottum* v. *Atmaram*, 23 B 597; *Harey H. Sinha* v. *Hari C. Sinha*, 40 CWN 1237; *Santosh Chandra* v. *Gyan Sunderbai*, 1974 MPLJ 679; *Hardeo* v. *Mahadev*, A 1966 All 543). If the suit is by a purchaser of the interest of a coparcener, he may sue only for partition of the property in which he has a share (*Ram Mohan* v. *Mulchand*, 28 A 39; *Delu Singh* v. *Jagdip*, A 1948 Pat 317, 28 Pat 398), but according to the Bombay, Calcutta and Madras rulings, even he must sue for a general partition (*Murarrao* v. *Sitaram*, 23 B 184; *Palani* v. *Masa*; 20 M 243; *Koer Hasmat* v. *Sunder Das*, 11 C 396). The High Court of Andhra Pradesh has held that an alienee of a coparcener's interest in the joint property has a legal right to sue for a general partition ignoring the private partition effected between the coparceners. In such a suit he can pray that his alienor should be allotted the items which he has purchased (*Malisetti Redda Apparao* v. *Chamarathi Ramchandran*. (1971) 1 APLJ 314). [See discussion in Gupte's Hindu Law, (III Edn.), Art. 48, note 82]. But in the converse case of a suit by coparceners against the auction-purchaser of a share in a particular property, there is no difference of opinion as to the right to sue for partition of such property alone.

If some property is left out no objection is taken by defendant or if by consent of parties some property is left in joint possession, a subsequent suit for its partition will lie (*Gopulal* v. *Gajasa*, A 1932 Nag 92, 138 IC 186), but not if the decree for partition declares that any property will remain joint (*Sasimohan* v.

4. The defendant No.1 is the father of the plaintiff and manager of the said family.

5. The said defendant No.1 is leading an immoral life and has incurred enormous debts and has been transferring portions of the family property, and the plaintiff apprehends that the whole family property would be wasted. The defendant No.1 has made the following, among other, mortgages and transfers :

* * * * *

6. For the above reasons it would be to the plaintiff's benefit to have his share separated by partition.

The plaintiff claims partition of the said property and separate possession of the plaintiff's 1/4 share.

Harinath, 32 CWN 1023). If any property is left out, the court has no power to compel plaintiff to include it but should dismiss the suit (*Chandi Shah* v *Bhora Shah*, 120 IC 544, A 1930 Lah 286).

If the properties are within the jurisdiction of different courts, section 17, C.P.C. permits a suit to be brought in any such court, but if a part of the property is within the jurisdiction of a foreign court, the same may be excluded from the suit brought in India. As a matter of fact, even if such property is included, Indian Courts will have no jurisdiction to partition it nor can any order be passed as regards movables outside India when the defendant does not reside in India (*Prem Chand* v. *Hiralal*, A 1928 Nag 295, 111 IC 135).

All that has to be alleged in a plaint for partition is the plaintiff's title to the share claimed, with such particulars of that title as are necessary, and the fact that the property is joint. Reasons for partition are not necessary to be alleged, e.g., that there are family quarrels or differences between co-sharers, etc. The mere fact of the property being joint gives a sufficient cause of action for a suit for its partition, as a right to claim partition is incidental to every joint ownership (*Kishan Lal* v. *Lotan Singh*, 39 PLR 876). Neither need any prior demand for partition be alleged, as none is necessary to enable the plaintiff to sue for partition (*Rajendra* v. *Brojendra*, 37 CLJ 191). Of course **when a suit is by a minor member of the coparcenary, the reasons for claiming the partition must be alleged.** For though a minor has a right to claim partition the court in its discretion may refuse it, if it is not for his benefit (*Bishundas* v. *Seogeni Rao*, A 1953 SC 280).

The date of the cause of action for a suit for partition would be the date when plaintiff acquired an interest in joint property. When the plaintiff is a coparcener, this would be the date of his birth. If the plaintiff is a purchaser, the date would be the date of his purchase. If the plaintiff has been excluded from the enjoyment of joint property, the date of such exclusion may be alleged as that of the cause of action.

No. 265—Suit for Partition by Purchaser of the Interest of one Coparcener

1. The defendants are members of a joint Hindu Family.

2. The property detailed in the plaint is part of the joint property of the said family and the defendants have been, and are, in joint possession of it.

It should also be mentioned in the plaint whether the plaintiff is or is not, in joint possession of the property, as that would determine the court-fee to be payable. In the relief claimed, the plaintiff need only claim partition and separate possession. He need not pray for appointment of commissioner to carry out the partition, or for any other matters of detail and procedure, as it is for the court to determine whether a commission is necessary or not and to give such directions for carrying out the partition as it thinks fit. But if the plaintiff wants any special matter to be taken into consideration for which an adjudication may be necessary, e.g., that the plaintiff has spent his own money in improving a particular item of the joint property and wants that property to be allotted to him, or the value of the improvement to be credited to him, he must not only make a prayer for the same but should also make allegations of such facts in the body of the plaint. In a joint Hindu family, if the manager has been in receipt of cash for the family, the plaintiff may ask for an order to him to render accounts of the savings in his hands for the purpose of partition (*Vikuntam* v. *Avudiappa*, 170 IC 234, A 1937 Mad 127). This account is unlike that of a trustee and is intended only to discover what are the joint properties of the family and in the absence of fraud or other improper conduct, the parties have no right to look back and claim relief against past inequality of enjoyment of the members (*Joytibali* v. *Lachhmeshwar*, A 1930 Pat 260; *Bhaurao* v. *Mangha*, 1961 NLJ Notes 435; *Jyoti Bhushen* v. *Gopal Chand*, 1959 ALJ 110; *Budhu* v. *Raghu*, A 1973 Orissa 85). The members are not entitled to any interest on the savings. All expenditure made by him must be accepted and a member can only show that they are not incurred in fact, but can not show their impropriety. The plaintiff may also ask for account from the date when separation takes effect.

Mesne profits are not ordinarily allowed in a partition suit but when plaintiff has been kept out of enjoyment he may be given mesne profits (*Sanbeerangonda* v. *Basangonda*, 184 IC 337, A 1939 Bom 313). If a defendant also wishes to have his share partioned off, he may make an application to the court to that effect, and the court shall separate his share also. If the defendant does not so desire the court will seperate the share of the plaintiff alone but ascertain and declare the shares of all of them (O. 20, R. 18) There is clear distinction between a *malafide* partition and an unreal or fictitious partition.

When the intention is that the past creditors of the father may be defeated or delayed and no provision is made in the partition for the payment of their debts, the partition is *malafide* and is not binding on the past creditors. The son may, how-

3. On November 14, 1982, at an auction sale in execution of decree No.475 of 1980, passed by the 1st Munsif of Burdwan, the plaintiff purchased the interest of defendant No.1 in the said property, but has not obtained possession (*or*, has on June 20, 1984, obtained joint possession through the court).

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ever, intend, that the son's interest may be safeguarded against future liabilities which may be contracted by the father. In such a case the partition may be genuine and not unreal. Where the intention is to defeat or delay the past creditors as well as to save the property from the clutches of the future creditors, the partition may be *malafide* as far as the past creditors are concerned, but it may not be unreal or fictitous as far as the future creditors are concerned (*Hirday Narain Rai* v. *Ram Das*, A 1951 All 606). Even if the motive is to defeat or delay the creditors and to save the property, the partition will be binding between the members, because the desire to save property from creditors will not prove fraud (*Lilawati* v. *Paras Ram*, A 1977 HP 1).

Under Hindu Law, joint status is a matter of intention. Separation results from intention to sever the joint status followed by conduct to effectuate that intention. Without such intention mere specification of share does not result in separation (*Ganga Narain* v. *Brijendra Nath Chaudhary*, A 1967 SC 1124). Definite and unequivocal intention of a member of joint family to separate himself can be expressed in several ways, one of the ways being the institution of a suit for partition of property (*Asa Nand* v. *Baldev Raj*, A 1975 All 139; *Nasirabad Urban Cooperative Bank Ltd.* v. *Gyan Chand*, A 1980 Raj 73). A coparcener's declaration of intention to separate must also be brought to the notice of other members and then it relates back to the date of manifestation of intention (*R. Raghavamma* v. *Cheehamma*, A 1964 SC 136). Revenue paper entries of ownership in equal shares alongwith some co-owner's statement that they are separate and render accounts to different co-owners according to their shares is the best evidence of separation (*Durga Pd.* v. *Ghanshiam Das*, A 1948 PC 210; *Charanjit Das* v. *Debi Das*, A 1957 All 522).

No right is acquired by mere mutation of the name in the revenue papers (*Kanhaiyalal* v. *Ramkunwarbai*, 1995 MPLJ 998, *Nirman Singh* v. *Lal Rudra Partab*, A 1926 PC 100). The entries in the Record of Rights regarding the factum of partition is a relevant piece of evidence in support of the oral evidence adduced to prove the factum of partition. Under the Hindu Law it is not necessary that the partition should be effected by a registered deed, even a family arrangement is enough to effectuate the partition between coparceners and to confer right to a separate share and enjoyment thereof (*Digambar Adhar Patil* v. *Devram Girdhar Patil*, A 1995 SC 1728). Mutation entries are inadmissible in evidence and cannot be relied upon (*Pakhar Singh Atwal* v. *State of Punjab*, A 1995 SCW 1565). Mere disagreement between father and son does not amount to a declaration of son's intention to separate from the family (*Indra Narayan* v. *Doop Narayan*, A 1971 SC

4. The share of defendant No.1 in the said property on the date of the said auction sale, was one-third.

The plaintiff claims partition and separate possession of the said one third share.

No. 266—Suit for Partition of Joint Family Property

Para Nos.1 and 2 as in precedent No.265.

3. Of the houses mentioned in the list of joint property at the foot of the plaint, the house No.1 has all along been in the possession of the plaintiff and his father, and the plaintiff has built a second storey on it with his self earned money at a cost of Rs.62,000.

1962). Where the court decrees a suit for partition brought on behalf of a minor, such decree relates back to the date of the institution of the suit for the purpose of determining the date of the severance in status (*Lakkireddi* v. *Lakkireddi*, A 1963 SC 1601; *Narsha Begum* v. *Arumuga Theoar*, A 1974 Mad 273; *Wasudeo Madhaorao* v. *State of Maharashtra*, 1975 Mah LJ 404). Where both the plaintiff and the defendant are minors, and a partition is alleged to have taken place between them it cannot be held to be binding unless confirmed or ratified by the minors on coming of age (*Tukaram* v. *Gangawai*, A 1952 Hyd 23).

Properties having joint family nucleus till the date of partition are to be treated as joint family properties. In the case of a Hindu joint family, there is a community of interest and unity of possession among all the members of the joint family and every coparcener is entitled to joint possession and enjoyment of the coparcenery property. The possession of one therefore, is the possession of all. Mutation in the name of the elder brother of the family for the collection of the rent and revenue does not prove hostile act against the other. (*Annasaheb Bapusaheb Patil* v. *Balwant Bapusaheb Patil*, A 1995 SC 895, 1995 ACJ 19 (SC), (1995) 2 SCC 544). There is no presumption that a family because it is joint, possessed joint property and therefore the person alleging the property to be joint has to establish that the family was possessed of some property with the income of which the property could have been acquired (*Surendra Kumar* v. *Phoolchand*, 1996 (2) SCC 491).

According to the notions of Hindu law, hereditary priesthood must be treated as immovable property capable of partition (*Bharthu* v. *Bhushan Prasad*, A 1952 Nag 307; *Angoorbala* v. *Devabrata*, A 1951 SC 295; *Rajkali* v. *Ramratan*, A 1955 SC 493). There is no justification why an insurance policy taken in the name of a member of a joint family should not be taken into account while making a partition, if the premia of the policy were paid out of the joint family funds (*Manharran Lal* v. *Jagiwan Lal*, A 1952 Nag 73).

4. Of the movable property of the joint family detailed in the plaint, the plaintiff is in possession of the following articles of jewellery and is

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Where a father of joint Hindu Family sells a specific property to a stranger and the sale is neither for legal necessity nor for payment of an antecedent debt, the sons are entitled, instead of bringing a suit for general partition, to sue for partition and possession of their share in the particular property which has been sold in order to get rid of the joint possession of the stranger (*Savandarbai* v. *Ram Ji Govinda*, 1952 NLJ 435). A purchaser of the share of the joint family property is entitled on partition of the share to which the vendor was entitled on the date of sale. The purchaser has no right of possession either exclusive or joint, his only right is to sue for partition as he is not tenant in common with other members (*Bhagwati Prasad* v. *Ushadevi*, A 1995 MP 205).

A partition once made cannot be reopened except on the ground of fraud or mistake in including property which did not belong to the joint family. If certain property is omitted from partiton it is not necessary to reopen partition but the excluded property can be divided according to the shares. It continues to be joint property till it is thus divided (*Balaji Ganoha* v. *Annapurnabai*, ILR 1952 Nag 99). Other grounds on which partitions can be reopened are (1) when partition is prejudical to the interest of minor coparcener (2) when it took place in the absence for an adult coparcener or for other allied causes (*Baidya Nath Misra* v. *Loknath Rath*, 1974 (1) CWR 163). If it can be shown that partition was obtained by fraud, coercion, misrepresentation or undue influence, it can be reopened. If some members are minors and partition is proved to be unjust and unfair and detrimental to their interest, it can be reopened, no matter when. it had taken place (*Ratnam Chettiar* v. *Son Kuppuswami Chettiar*, A 1976 SC 1; *Sukhrani* v. *Hari Shanker*, A 1979 SC 1436). There is no justification, however, for reopening the partition merely because some properties have not been partitioned or unequality of share (*Harekrishna Sahu* v. *Bhagirathi Sahu*, (1974) 40 CLT 597. A 1975 Orissa 97).

Except in the case of reunion, the mere fact that separated coparceners choose to live together or act jointly for purposes of business or trade in their dealings with properties would not give them the status of coparceners under the Mitakshara Law (*Bhagwati Prasad* v. *Rameshwari Kuer*, A 1952 SC 72; *Kalyani* v. *Narayan*, A 1980 SC 1173). An attachment of the undivided share of a member of Mitakshara causes a severance of status (*Muneswari* v. *Jugal Mohini*, A 1952 Cal 368).

A suit by a member of joint Hindu family for partition of residential house impleading only such of the members as are interested in the property in suit, is maintainable. Members who are interested in the joint family properties other than the property in suit, are not necessary parties. The plaintiff need not bring into the hotchpotch all the properties which belong to the joint family (*Kasiwar Basu* v. *Nakuleswar Bose*, A 1952 Cal 738).

The court may pass a preliminary decree under O. 20, R. 18 declaring the share of the parties to be divided actually by a final decree at once, e.g., in case of

prepared to place it in the hotchpotch, and the rest is all in the possession of the defendant (*Description of jewellery*).

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cash. If it passes preliminary decree, the subsequent procedure differs in different states. In some states, the case continues and the court takes steps to pass a final decree without any application by the plaintiff while elsewhere the court leaves the case after passing a preliminary decree and does not take up the matter of actual partition until moved to do so. Where the latter practice prevails, there is no limitation for such application (*Lalta Prasad* v. *Brahma Din*, 5 Luck 280). Where a prayer for *mesne profits* is also joined, such profits can be awarded in final decree (*Swaminath Odyar* v. *Gopal Swami Odayar*, (1938) 2 MLJ 704, 1938 MWN 1214). In a partition decree court can impose a condition that plaintiff shall discharge debts binding on the family from the joint estate (*Arvapalli Subramaniyam* v. *Official Receiver Guntier*, (1975) 2 APLJ 251).

Family debts : If the father has incurred any debts which the son is under a pious obligation to pay, either sufficient property must be allotted to the father in addition to his proper share to cover the son's proportion of debts or the debts must also be equally divided between the co-sharer. If this is not done the creditor will be entitled to recover the debt from the shares of the sons also after partition (*Subramania* v. *Sadapathi*, 110 IC 141, 51 M 61, A 1928 Mad 657; *Ganga Ram* v. *Lalumal*, 125 IC 39; *S.M. Jakati* v. *S.M.Borkar*, A 1959 SC 282) but the sons should be made party to the suit or decree before their share can be attached (*Surajmal* v. *Motiram*, 41 BLR 1177, A 1950 Bom 278; see contra, *Suryanarayana* v. *Ganesulu*, A 1954 Mad 203). The proper course is to make provision for payment of the debts and to partition the rest of the property only (*Sat Narain* v *Sri Kishen*, 164 IC 6, 40 CWN 1382, A 1936 PC 277; *Krishnamurthy* v. *Sundarmurthy*, 13 IC 251, 32 M 381; *Virupaksha* v. *Chanalal*, A 1943 Mad 652, 1943 MWN 429). Creditors of the father can be made parties to a suit for partition and the father can insist that provision should be made in the decree for payment of those debts provided of course they are legally binding on the sons (*Gangaram* v. *Lalumal*, 125 IC 39). Where an alienee is also party, attempt should be made as far as possible to allot to him the property alienated (*Virupaksha* v. *Chanalal*, A 1943 Mad 652; see also *V.D. Deshpande* v. *Kusum Kulkarni*, A 1978 SC 1791).

Limitation : 3 years under Article 113 of the Act of 1963; but as this is a continuing right under section 22, partition suit can be filed any time during joint possession of the joint property. If the plaintiff is out of possession, limitation is 12 years from the date of exclusion (Article 110). Where the plaintiff was a purchaser of the interest of a coparcener, old Article 120 (now Article 113), was held to apply if he was not in joint possession (*Bai Shevant Bai* v. *Janardhan*, 184 IC 23, A 1939 Bom 322). The same limitation applies in cases of movable property also (*Ganesh Dutta* v. *Jawach*, 31 C 262 PC). But if the parties are not members of joint Hindu family, Article 110 will not apply, and Article 64 or 65 will apply, depending upon the nature of claim. The limitation is 12 years under both Articles.

The plaintiff claims (1) Partition of the said property and separate possession of his 1/4th share.

(2) That house No.1 be allotted to the plaintiff's share.

Defence : The defendant may dispute the plaintiff's share. He may plead that the plaintiff has been out of possession and should pay *ad volorem* court-fee, or that the plaintiff's title has been extinguished by adverse possession of the defendant, but a mere want of possession of the plaintiff, **without actual exclusion**, is no defence, hence a plea that the plaintiff, has not been in possession within 12 years is not ordinarily sustainable in such cases. If any property has not been included in the partition, the defendant may take that objection. If he has substantially improved any property with his separately acquired money, he may either claim that the portion so improved should be allotted to him (*Nutbehari* v. *Nainilal*, 167 IC 321, 41 CWN 613, A 1937 PC 61), or may claim credit for the expenses incurred (*Dayaram* v. *Shyam Sunder*, A 1965 SC 1049). He may plead that there has already been a private partition between the parties, but such previous partition must have been made according to the rights of parties and not merely for convenience of enjoyment (*Sarat Chandra* v.*Ganga Charan*, 43 CWN 181, 698 CLJ 527). He may plead that any property is impartible under any law or custom or may set up an agreement of the coparceners not to make a partition as such agreement is valid (*Kameshwar* v. *Rajbansi*, A 1943 Pat 433). He may pray for sale of the property, instead of partition, under section 2, Partition Act, showing that the property is incapable of proper enjoyment after partition, e.g., that a house is too small (*Chandrawati* v. *Kallu*, A 1973 All 406). A family settlement can be oral, which can be proved subsequently, and the same does not require registration (*Ram Lal* v. *Harbhagwan Dass*, (1995)1 Punj L R 368 (P&H); *Gulabchand* v. *L.Rs. of Ganpatlal*, 1995 AIHC 2116 Raj DB).

If the suit is by a purchaser of the share of coparcener in a dwelling house belonging to an undivided family, the defendant may offer to purchase the plaintiff's share under section 4, Partition Act. Even a defendant may be treated as a plaintiff for the purpose of section 4 (*Satyabhama* v. *Jatindra Mohan Deb*, 116 IC 161, A 1929 Cal 269 DB; *Shesadhar* v. *Kishen Prasad*, 190 IC 117 Pat; see also *Sakhawat* v. *Ali Husain*, A 1957 All 357 FB). An application under section 4 may be made after the preliminary decree (*Mian Jaffar* v. *Mt. Bibi*, A 1943 Pat 79; *Dwarkadas* v. *Godhana*, A 1939 All 313); but not in execution after decree (*Mst. Mohamafi Begum* v. *Md. Nabi*, 1954 ALJ 621), or even at the appellate stage (*Satyabhama* v. *Jatindra Mohan Deb*, 116 IC 161, A 1929 Cal 269 DB). "Undivided family" does not mean Hindu family only but the family may be Mohammedan (*Rukia Bibi* v. *Rajia Bibi*, A 1953 Mad 298; *Tejpal Khandelwal* v. *Mst. Purnimabai*, A 1976 Orissa 62), or a Christian family (*Chatterji* v. *Maung Mye*, A 1940 Rang 53; *Tejpal Khandewal* v. *Purnimabai*, A 1976 Orissa 62). Any one of the defendants may apply for separation of his share also, and there is no objection to the prayer being made, in the alternative, in the written statement in which the defendant disputes the plaintiff's

(3) That the material of the second storey of house No.1 be not taken as part of the joint property.

(4) That if the house No.1 be not allotted to the plaintiff, he should be given credit for the cost of materials of the second storey.

No. 267—Suit for Partition between Other Co-owners (o)

1. The house described below was the property of one Ramlal.

Description of the House

* * *

2. The said Ramlal left two sons, Kishanlal and Shamlal.

3. The said Shamlal transferred, under a sale-deed, dated June 4, 1990, his half share in the said house to the plaintiff.

4. The said Kishanlal transferred, under a sale-deed dated January 15,1992, his remaining half share in the said house to the defendant.

5. The defendant is in possession of the said house.

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right to claim partition. The court cannot refuse the request except for some special reasons (*Loke Nath* v. *Radha Gobinda*, A 1926 Cal 184, 86 IC 76 DB), but such a request cannot be made after the preliminary decree has been passed (*Ramnarain* v. *Ramdas*, 111 IC 713, A 1929 All 65 DB). There is no objection to his claiming share by metes and bounds even in property in which plaintiff has no share but one of the other defendants claims a share (*Insane Nilgobind* v. *Sri Rukmini*, A 1944 Cal 42).

He may plead that he has been in long possession of any item of property or has improved it, and therefore it should be allotted to him (*Dhian Singh* v *Dalip Singh*, 18 Lah LT 10).

(o) Every co-sharer in the joint property, whether a minor or a major, is entitled to bring a suit for partition of the property. All the remaining co-sharers must be made defendants. It is essential that the plaintiff should be in actual or constructive possession (which may be through another co-owner whose possession is *prima-facie* the possession of the plaintiff also). If, however, he is not in possession at all of any portion of the joint property, and there has been a complete ouster, he must sue for recovery of possession and partition. If, however, the possession of the plaintiff is admitted or established over what forms part of the joint estate the suit does not cease to be one for partition merely because the defendant denies the title of the plaintiff to a share of the estate or to specific lands of the estate and asserts a hostile and adverse possession therein (*Sabjan* v. *Asanulla*, 101 IC 622, 31 CWN 406).

All that has to be alleged in the plaint is the bundle of facts showing the plaintiff's title to the share claimed, and showing that the property is joint. It

The plaintiff claims possession of a separate half share of the said house by partition thereof.

DECLARATION

No. 268—Suit for Declaration of Title *(p)*

1. The plaintiff is the owner of the fields detailed at the foot of the plaint and is, and has been, in possession thereof as such owner.

2. The defendant made an application to the settlement officer that he was the owner of the land and that the plaintiff was his tenant, and that

should also be alleged whether the plaintiff is in possession or not. If partition is sought in a particular way, e.g., by allotment of a particular property to a particular co-sharer, fact on which such claim is founded should be alleged. Almost the same pleas as are mentioned in the last note may be urged by the defendant. All equities between the co-owners should be worked out, e.g., if the property was jointly purchased but the defendant had advanced more than half the money, he can claim the excess due from the plaintiff before allowing partition (*Poovanalingam* v. *Veerayi*, A 1926 Mad 186, 22 MLW 782). A co-sharer cannot be compelled to pay for the improvements made on the common property by another co-sharer without the former's consent. But the court will make every effort to effect partition in such a way that the cosharer who made the improvements, is allotted the portion of the property where the improvements stand so long as this can be done without prejudice to the other co-sharers (*Kochummini Kassinkunju* v. *Sankara Pillai Velayudhen Pillai*, 1972 Ker LJ 883).

(p) A declaration can be made only in respect of (a) any right to any property or to any legal character (b) that the defendant has denied or is denying and (c) where the plaintiff is not in a postition to claim any further relief (*State of M.P.* v *Khan Bahadur H.H. D.H. Bhiwandiwala*, A 1971 MP 65). The power of court to grant a mere declaratory decree is not confined to section 34 Specific Relief Act only. Such decree can be granted under section 6, or O.8, R. 7 C.P.C. (*Ramaraghava Reddy* v. *Seshu Reddy*, A 1967 SC 436. Declaration that the compromise decree is not binding upon the deity). A suit for declaration that the termination of services is illegal and the service subsists would lie if there has been violation of any constitutional or statutory provision (*High Commissioner* v. *I.M.Lal*, 1946 ALJ 266; *Surendra Nath* v. *Indian Air Lines Corporation*, A 1966 Cal 272). But suit for declaration about subsistence of purely personal contract will not lie as it is not a legal character (*Guntur Tobacco Co.* v. *Tarabettur*, A 1965 AP 266; *Rama* v. *Narain*, 39 M 80). A suit would not lie for a declaration of rights affecting only pecuniary liability (*Mahabir Jute Mills* v. *Kedar Nath*, 1959 ALJ 890; *Nathuram* v. *State*, 1961 MPLJ Notes 172), nor a suit for a declaration that the plaintiff did not infringe defendant's trade mark (*Mohammad Abdul Kadir* v. *Finlay*, 111 IC 136, A 1928

officer has, by an order, dated January 19, 1996, directed that the defendant should be entered in the papers as owner of the said fields.

The plaintiff claims a declaration that he is the owner of the said fields.

Rang 256, 6 R 291), but a declaration that plaintiff is the legitimate son of the defendant can be given (*Haji Abdul Karim* v. *Mst. Sarayya*, A 1945 Lah 266). A declaration of merely legal consequences of want of registration of compromise cannot be made (*Uday Chand* v. *B.H. Parmer*, 44 CWN 1063). **The plaint should, therefore, show both these things, viz. (1) the plaintiff's title to the property or to the legal character and (2) that the defendant has thrown a cloud on it,** e.g., by claiming it as his own or by denying the plaintiff's title, or by having his name recorded in the papers as a proprietor of the property claimed by the plaintiff. The mere assertion by a plaintiff in possession of property that the defendant intends to transfer the property and that he has declined to admit plaintiff's right does not amount to an invasion of plaintiff's right or to a clear threat to invade that right so as to give cause of action or a suit for declaration (*Nanak* v. *Faqira*, A 1940 All 424, 1940 ALJ 459). A suit simpliciter for a negative declaration about the status of the defendant is not maintainable (*Mool Raj* v. *Atma Ram*, A 1986 J & K 24). Though a declaration can be claimed about plaintiff's right and not about absence of defenfdant's title, yet where the former followed from the latter, the court allowed the suit (*Jasoda* v. *Mangal*, 45 CWN 570). The object of the proviso to section 42 (now section 34), Specific Relief Act is to prevent multiplicity of suit by preventing a person from putting a mere declaration of right in one suit and then later seeking the remedy without which the declaration would be useless. The "further relief" referred to in the proviso must be a relief flowing directly and necessarily from the declaration sought and a relief appropriate to and necessarily consequent on the right or title asserted (*Manku Charan* v *Hari Narain*, A 1947 All 351).

Declaration is a discretionary relief and cannot be claimed as of right. It will be refused if it is useless to grant it (*Sain Das* v. *Chowla*, A 1940 Lah 1, 186 IC 646), or it is unnecessary because mere denial of plaintiff's right is not likely to injure him (*Ahmad Yar* v. *Haji Khan*, A 1944 Lah 110). It will also be refused if the object of the suit is to evade payment of stamp duty and court fee (*Anil Kumar* v. *Suman Bala*, A 1980 Delhi 103). If the plaintiff's title depends on a contract entered into in contravention of government rules, the court may refuse the declaration, e.g., if a *patwari* acquires land within the circle (*Shiamalal* v.*Chakkenlal*, 22 A 220; *Sheo Narayan* v. *Mata Prasad*, 27 A 73).

A plaintiff's right to maintain a mere declaratory suit must be determined as it exists on the date of the suit and is not affected by the fact that during the pendency of the suit, the right to claim consequential relief has also accured to him. The expression "omits to do so" in the proviso to section 42 (now section 34) of the Specific Relief Act, apparently refers to the ability of the plaintiff on the date of the institution of the suit and cannot be stretched to include subsequently acquired

No. 269—Suit for Declaration and Alternatively for Possession

1. The plot of land lying to the south of the plaintiff's house in *mohalla Kazi* in the town of Basti and shown in the map annexed to the plaint (which should be deemed to be part hereof) by letter A is part of the plaintiff's said house and belongs to him.

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ability also (*Jethu Singh* v. *Kishan Singh*, A 1951 Pepsu 48). A suit for mere declaration that the plaintiff is owner of a portion of the amount deposited in court without consequential relief for refund is maintainable if at the time of the institution of the suit the amount is in possession of the court pending the decision of the suit (*Neelamoni Sahu* v. *Khetrabasi Sahu*, A 1954 Orissa 37). Suit for declaration that plaintiff is owner of truck which was seized by police from custody of plaintiff is maintainable without seeking relief for recovery of possession, as the custody of police is for the benefit of the party found entitled to its possession (*S. Gurdial Singh* v. *Sunda Hire Purchase Corporation*, A 1970 Pat 7). A suit for declaration about date of birth is maintainable because the date of birth is intermingled with the status of a person (*State of Orissa* v. *Indapali Babaji*, 1971 (2) CWR 596).

Absence of prayer for consequential relief is immaterial when the plaintiff is incompetent to seek any further relief (*Jyotermoyee Devi* v. *Durgadas Banerjee*, A 1976 Cal 238). Thus when a creditor has filed suit under section 53 of Transfer of Property Act for a declaration that the decree for partition obtained by the insolvent is fraudulent and is intended to defeat the creditors, and that the transfer will not bind the creditiors, no further relief can be claimed by the plaintiff and section 34 of Specific Relief Act, 1963 does not bar the suit (*K.D. Talwar* v. *Adeshwar Lal*, A 1972 Delhi 122.) Where property is owned by deity or Math or by some other juristic person, and the only dispute is about the human agency which should administer the affairs of such institution, the plaintiff need not claim relief of possession over property (*D.A.V. College* v. *S.N.S.H. School*, A 1972 P & H 245). But when the plaintiff's title to be the manager of the Waqf is denied by defendant and the defendant also denies that property is Waqf property, then the plaintiff should also claim relief of possession (*Mir Ghulam Hasan* v. *Mir Maqbool Singh*, A 1975 J & K 57).

Suit of plaintiff for declaration that he was the only heir of the deceased was held maintainable although the plaintiff had not prayed for cancellation of the succession certificate granted in favour of the defendant. It was observed that cancellation of succession certificate was not necessary consequential relief because plaintiff could have got insurance amount from insurance company by showing the declaratory decree (*Indramani Bedbagis* v. *Hema Dibya*, A 1977 Orissa 88). Suit for declaration of title to house has been held to be maintainable without praying the relief of declaration of title over the site (*Haladhar Sharma* v. *Assam Go-Sewa Samity*, A 1979 Gau 23). A co-owner's suit for declaration of joint

2. At the last revision of records of the town of Basti the said plot has been denoted in the *khasra* by No.659 and has been shown therein as the property of the defendant.

3. The plaintiff is still in possession of the said plot.

ownership is maintainable without any prayer for partition and separate possession, because he may like to enjoy the property as co-owner (*Chhamman Khan* v. *Allah Dei*, 1980 AWC 523). When the plaintiff prayed for a mere declaration that the retention of his pistol in the State *malkhana* was illegal and that he is the owner of the pistol, he cannot be compelled to seek a relief for possession of pistol, as the possession of State is that of a trustee for the rightful owner (*Narain Singh* v. *State of Uttar Pradesh*, A 1981 All 246).

Limitation : 3 years under Article 58 from the date when the right to sue first accrues. Also see Article 113 for suit for declaration of title. The plaintiff is not, however, bound to rush to court at the earliest whisper of denial but may wait until the title is jeopardised or lost by adverse possession, etc. (*H.K. Dasappa* v. *Tammanna*, A 1984 Karn 153). A compulsory cause of action depends upon the question whether that threat effectively invades or jeopardizes the title (*Mst. Rukhmabai* v. *Laxminarayan*, A 1960 SC 335).

Defence : The defendant may plead that the plaintiff could claim a further relief, such as possession, injunction, etc., and therefore the suit for mere declaration is barred. He must allege the consequential relief which the plaintiff could claim and a bare plea that the suit is barred by section 34, Specific Relief Act (as in usually taken) should not be allowed without such particulars. If the consequential relief cannot be granted against the defendant, but is available against a third person, this plea cannot be urged. For example, a suit can be brought for a mere declaration that the plaintiff is the owner of the property and the defendant cannot sell it in execution of a decree against a third person and the defendant cannot plead that the plaintiff is not in possession. Similarly, if neither party is in possession, one may sue the other for declaration of title (*Chinnammal* v. *Varadarajulua*, 15 M 307). The consequential relief omitted must be such as could be obtained on the date of suit (*Thakurji* v. *Kamta Prasad.*, 27 ALJ 1201, A 1929 All 974 DB). Therefore, if defendant obtains possession during pendency of a suit for declaration, the suit cannot be dismissed (*Mogaji* v. *Anant*, A 1948 Bom 396). A relief for redemption of a mortgage is not consequential to a declaration that the plaintiff as the reversioner of the mortgaged land is entitled to redeem (*Sheo Pd. Singh* v. *Ram K. Singh*, 181 IC 570, A 1939 All 249). The defendant may show that the case is one in which the court should exercise its discretion against the plaintiff. It is unnecessary to plead that the plaintiff has not been in possession of the property within 12 years. If the defendant is in possession, a plea of section 34 should be raised. If the defendant has become owner by adverse possession for over 12 years, that plea should be raised but the mere fact that plaintiff had not been in possession within 12 years would not negative the plaintiff's title. A defendant cannot raise the question of title of a third person who is not in possession (*Kaniz Fatima* v. *Jai Narain*, A 1944 Pat 334).

The plaintiff claims :

(1) A declaration that he is the owner of the said plot of land.

(2) Alternatively, if the plaintiff is found to be out of possession, possession of the same as against the defendant.

REGISTRATION

No. 270—Suit to Compel Registration *(q)*

1. On October 4, 1994, the defendant executed the mortgage deed hereunto annexed, in favour of the plaintiff.

2. On November 14, 1994, the plaintiff presented the said document to the Sub-Registrar of Meerut for registration, but the said Sub-Registrar refused to register the same on the ground that the defendant did not appear before him.

(q) Such a suit can be instituted only under section 77, Registration Act and not independently of it (*Uma Jha* v. *Chetu Mander*, 95 IC 187, A 1926 Pat 89 DB). The plaintiff may, instead of this suit, sue for specific performance of the contract, using the unregistered deed as evidence of contract (*Jhamman* v. *Amrit*, A 1946 Pat 62; *Bhagwati Prasad* v. *Katori Devi*, 1981 ALJ 677). It can be brought by a person claiming under a document only when the Registrar has refused to register the document under section 72 or 76 of the Registration Act, that is :

(1) When the Sub-Register refused to register it on any ground other than denial of execution and the Registrar confirms that order in appeal; or (2) when the Sub-Registrar refuses to register the document on the ground of denial of execution and the Registrar refused to interfere on an application made to him under section 73; or (3) the document is presented initially to the Registrar and he refused to register it on any ground except want of territorial jurisdiction or that the document ought to be registered in the office of a Sub-Registrar. The alleged executant of the document is the only person who should be made a defendant, and as a question of title is not within the scope of the suit, a prior purchaser of the property should not be impleaded (*Bikuntha* v. *Sarat*, A 1925 Cal 1257 DB; *Jokhan Jha* v. *Rama Saran Jha*, A 1973 Pat 443; see also *Nawab Ali* v. *Ram Murti*, A 1984 All 325). An order returning a document on the ground that the executant is dead and the question of his successor has not been settled is tantamount to an order refusing to register the document (*Barkha* v. *Shiv Ram*, 102 IC 76, 8 Lah 208, 28 PLR 349). No other claims can be joined in such suit (*Probodh* v. *Banka*, 56 CLJ 413), but if they are joined, the plaint should be ordered to be amended but the suit should not be dismissed (*Venkata* v. *Veeramma*, 9 MLJ 105). No suit can be brought after Sub-Registar's refusal, unless an appeal has been filed and the Registrar has refused registration (*Kisian* v. *Dalsuk*, 182 IC 943, A 1939 Bom 254; *Ram Singh* v. *Jasmer Singh*, A 1963 Punj 100).

3. The plaintiff preferred an appeal to the District Registrar of Meerut, but that officer, by an order, dated January 15, 1995, refused to direct the registration of the said sale deed.

(*Or*, 2. On November 15, 1994, the plaintiff presented the said sale-deed to the Sub-Registrar of Meerut for registration, but the defendant denied its execution before the said Sub-Registrar, who therefore refused to register it.

3. The plaintiff applied to the District Registrar of Meerut for reversal of the said order of the Sub-Registrar, but that officer by an order, dated January 15, 1995, refused to direct the registration.)

The plaintiff claims a decree directing the document to be registered.

PRE-EMPTION *(r)*

No. 271—Suit for Pre-emption Based on Mohammedan Law *(s)*

1. One Rasula sold 3/4th share in the house described below to the

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Registrar is not a necessary party, and even if he is impleaded, notice under section 80, C.P.C. is not necessary (*Sultan Ahmad* v. *Gaudar Begum*, 186 IC 505, A 1940 All 108).

In such a suit the plaintiff must allege execution of the document, its presentation at the proper time and one of the above three facts. In case of a document executed by a lady the question whether it was executed under circumstances which would make it operative against her as a *pardanashin* lady is alien to the enquiry (*Abdul Gafar* v. *Badial*, A 1931 Cal 588, 139 IC 234, 55 CLJ 103).

Limitation : The period of limitation for this suit is very short, viz. 30 days from the date of the refusal as provided in section 77 itself. If the order is passed in the absence of the plaintiff and the plaintiff had no previous notice of the date on which it was passed, the period can be counted from the date on which the order is communicated to him (*K.V.F. Swaminathan* v. *Letchmanan Chettiar*, 53 M 491).

Defence : The defendant may deny execution of the deed, but he cannot raise an issue of invalidity of the document or any other such issue (*Ram Ghulam* v. *Meda*, 19 ALJ 224; *U.T.Jain* v. *Daud*, A 1938 Rang 176, 176 IC 140). He cannot plead that the document is not binding on him (*Jwala Sahai* v. *Balbhaddar*, 88 IC 494 Oudh). He may plead that the document was not duly presented for registration or document had been tampered with (*Probodh* v. *Banka*, 56 CLJ 413). The court cannot, in such a suit go into the defence as to whether the document was obtained by fraud or misrepresentation or even a defence that the mind of the executant did not accompany his signature (*Boparayya* v. *Bangaria*, A 1949 Mad 215).

(r) A right of pre-emption is a right of substitution and is not a right of

defendant by a sale-deed, dated January 14, 1995, for an ostensible consideration of Rs.40,000.

Description of the House

* * * * *

2. The real consideration was only Rs.30,000.

3. The plaintiff and Rasula are both Sunni Mohammedans.

4. The plaintiff owns 1/4th share in the house and is a *Shafi-i-Sharik* and the defendant has no right equal, or superior to, that of the plaintiff.

5. The plaintiff heard of the sale for the first time on February 20, 1995, and immediately declared his intention to assert the right of pre-emption.

6. The same day, i.e., on February 20, the plaintiff made a formal *talab-i-istishad* in the presence of witnesses, and in the presence of the defendant and the said Rasula (*or*, on the said house).

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transfer (*Kundal Lal* v. *Amar Singh*, 25 ALJ 739). A claim for pre-emption can be based on Mohammedan law, or on local custom, or on a contract, or on a special statute such as section 3, 4, of Partition Act (*Bholanath* v. *Sailendra*, A 1984 Cal 319) or the Punjab Pre-emption Act (*Thoilu* v. *Krishna Gopal*, A 1984 HP 58). It can be based on more than one of these grounds in the alternative (*Chadammilal* v. *M. Baksh*, 1 A 563; *Maratah Ali* v. *Abdul Hakim*, 1 A 567). If such alternative grounds are taken the allegations required to be made in case of claim on each of such grounds must be fully and separately stated. Pre-emption on the ground of vicinage has become invalid on the coming into force of the Constitution and pre-emption on this ground cannot be claimed any more (*Bhauram* v. *Baijnath Singh*, A 1962 SC 1476; *Sant Ram* v. *Labh Singh*, 1964 ALJ 852 SC). The courts have not looked upon the right of pre-emption with great favour, presumably for the reason that it operates as a clog on the right of the owner to alienate his property. The right of pre-emption is lost by estoppel and acquiescence based on conduct of a party (*Indira Bai* v. *Nand Kishore*, A 1960 SC 1368; *Roop Bai* v. *Mahaveer*, A 1994 Raj 133; *Indira Bai* v. *Nand Kishore*, A 1991 SC 1055).

If the defendant has not paid the whole money, which the plaintiff admits to be the consideration, to the vendor, but a portion has been left with him for payment to a creditor of the vendor, the plaintiff is liable to pay the defendant only so much as he has paid actually or by passing a pronote or a bond, either to the vendor or to his creditors. If any sum remains unpaid, the plaintiff is not liable to pay it to the vendee but will retain it in his hands for payment according to the directions in the sale deed. The plaintiff should, therefore, offer to pay only so much as has been paid by the defendant. If he pays the whole price, though a portion was left with the

The plaintiff claims possession over 3/4th share of the said house on payment of Rs.30,000 or whatever sum the court may hold to be the real price (*or*, of a half share in the said house on payment of Rs.15,000, *or* half of what the court holds to be the real price).

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vendee to pay off a prior mortgage on the property to be pre-empted, he may have to pay the mortgagee over again (*Ram Richa* v. *Raghunath*, 16 ALJ 531). But the plea that he will retain a portion of the consideration for payment to creditors and will not pay the whole to the vendee should be raised in the suit, and if a decree is passed directing payment by plaintiff, plaintiff cannot be allowed to deduct the money left with purchaser for payment to creditors (*Umrao* v. *Kanwal*, A 1933 All 30,141 IC 10, 33 A 113).

In all cases when the plaintiff does not offer to pay the full amount entered in the sale-deed, he should offer, in the alternative, any amount which the court thinks proper.

Limitation : One year from the date, the purchaser taking physical possession, but if the property is not capable of such possession, from the date of registration of sale-deed (Article 97). Legal disability does not save limitation (section 8). But if the sale is disguised as a mere creation of occupancy rights in order to deceive the pre-emptor, he can claim limitation from the date on which he becomes aware of this fraud (*Ganesha* v. *Sadiq*, A 1937 Lah 97, 172 IC 104).

(s) There are three classes of pre-emptors under the Sunni Mohammedan Law, viz. (1) co-sharers, (2) participators in appendages and amenities, and (3) owners of adjoining property, in cases of houses, gardens, etc. A suit on the third gound is, however, not maintainable now because of the decisions in *Bhauram* v. *Baijnath Singh*, A 1962 SC 1476 and *Sant Ram* v. *Labh Singh*, 1964 ALJ 852. After the sale, and before a suit, a plaintiff has to make two demands: (1) *talab-i-muwasibat*, and (2) *talab-i-istishad*. Want of any such demand is fatal to the suit. The right of premption is a weak right and strict compliance of demands is insisted (*Rajendra Kumar* v. *Rameshwar Das Mittal*, A 1981 All 391).

The plaint in a suit for pre-emption must allege the class of pre-emptors to which the plaintiff belongs, and the fact that the vendee does not belong to any of the two classes or belongs to any class lower than that to which the plaintiff belongs. If the vendee is of the same class as the plaintiff, the plaintiff cannot sue, according to the Calcutta High Court, unless the former has joined with him a stranger (*Sobiram* v. *Raghubardyal*, 15 C 224), but according to Allahabad High Court, the plaintiff and the vendee will take the property in equal shares, and in such a case, the plaintiff must claim pre-emption only in respect of a proportionate share, e.g., of half, if there is only one plaintiff and one vendee, a third, if there is only one plaintiff and two vendees (*Abdulla* v. *Amanatulla*, 21 A 292). The plaintiff should allege the particulars of the sale, and if he does not admit the consideration, he should state what the real consideration was. He should allege the making of the two *talabs*. If the *talab* has not been made by him but by an agent, the agent should be named.

No. 272—Suit for Pre-emption Based on Local Custom *(t)*

1. There is a local custom of pre-emption in cases of sales of house in *mohalla* Abupura in the town of Muzaffarnagar. The Mohammedan law of pre-emption is, by the said custom, applicable except that no

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Transfer in lieu of dower debt is a sale and subject to pre-emption according to the majority of High Courts (*Nathu* v. *Shadi*, 37 A 522; *Saburannesa* v. *Saledu*, 152 IC 422, A 1934 Cal 693, 38 CWN 747; *Khamrunisha* v. *Shah*, 21 MLJ 958). The right is also available in court sales (*Chenne Kunj* v. *Kesavari*, A 1966 Ker 260).

The whole property sold by the sale-deed should be included in the claim except when the plaintiff is not entitled to pre-empt any specified part (*Zainab Bibi* v. *Umar Hayat*, 1936 AWR 492, 161 IC 753, A 1936 All 732). Besides the *talabs*, no other notice or demand or tender is necessary before the suit, and even if one has been given or made in fact, it need not be alleged in the plaint. The plaintiff should, in the plaint, offer to pay the price admitted by him. It is better to offer, in the alternative whatever the court may find to be the real price, for some High Courts have held that if the price was more than that offered by the plaintiff, the suit should fail.

If the suit is claimed to be within time from the date of defendant's taking possession, the date on which the defendant obtained possession must be alleged in the plaint, otherwise the date of registration of sale deed.

Defence : Besides denial of the right by which the plaintiff claims and of the performance of one or both of the *talabs*, the defendant may plead that he has a superior or an equal right. He may plead a surrender or acquiescence by the plaintiff of his right of pre-emption. He may plead a refusal by the plaintiff to purchase the property before it was actually sold to the defendant, but such refusal can bar the suit only if it was made *after the contract with the defendant had been completed*, and not if the property was offered to the plaintiff before or during the negotiations with the defendant (*Kanhailal* v. *Kalka Prasad*, 2 ALJ 390, 29 A 670). The defendant may plead that the whole property is not included in the claim. An issue about the price may also be raised. As the right of plaintiff must extend up to the date of the decree, the defendant may show that the plaintiff has lost that right (*Ishaque Hajam* v. *Addl Member, Board of Revenue*, A 1986 Pat 53). Estoppel is a good defence (*Indira Bai* v. *Nandkishore*, A 1991 SC 1055).

(t) Where the Mohammedan Law does not apply and there is no statutory law of pre-emption, no pre-emption can be claimed except under a contract or under a local custom or usage. In such cases the Mohammedan Law applies with such changes, if any, as have been made by the said custom. For example, the Mohammedan Law of Pre-emption applies by custom to Hindus of Bihar, that part of Rajasthan which was formerly called Ajmer-Merwara and certain parts of Gujarat, and to house property in certain places in the U.P. (e.g., in Muzaffarnagar town, the

particular form of *talab* or demand is necessary, but a demand is required to be made in any form.

2—4. (*Same as paras 1,2,4, of previous precedent*).

5. The plaintiff made a demand of pre-emption by a registered notice sent on March 14, 1995, to the defendant but the defendant did not give any reply to the said notice.

The plaintiff claims, etc.

MINORS

No. 273—Suit by a Minor for Setting Aside a Decree Obtained against him as Major *(u)*

1. The plaintiff was born in 1977, and in 1993 was a minor (*or*, the plaintiff was born on December 3, 1975 and was, on November 4, 1993, a minor).

2. The defendant instituted a suit against the plaintiff in this court (being suit No.225 of 1993), and obtained a decree on November 4, 1993.

City of Varanasi and the Kumaun division). The custom prevails in Ahmedabad and Godhra, but not in Madras or Bengal. As noted by the Supreme Court the custom has been recognised mostly in North India but not in South India (*Bhuaram* v. *Baijnath Singh*, A 1952 SC 1476).

In all suits based on local custom, there should be an allegation of the custom with particulars (see Chapter II, *ante*). Ordinarily the presumption is that the custom of pre-emption is in accordance with Mohammedan Law (*Ram Prasad* v. *Abdul Karim*, 9 A 513), and therefore the terms of the custom need not be detailed in the plaint, but where that law is modified to any extent by custom (e.g., it has been found that *talab-i-ishtishad* is not necessary in case of houses in a part of Muzaffarnagar town) such modification must be alleged. The plaint should contain all the allegations necessary in a suit under the Mohammedan law; except those which are not necessary by reason of any modification of the law.

(u) A decree obtained against a person who is described as major but who was in fact a minor is a nullity (*Radha Krishan* v. *Ram Nagar*, A 1951 All 341 FB; *Inderpal* v. *Sarnam Singh*, A 1951 All 823; *Nathumal* v. *Nair*, A 1955 All 584; *Mahashay Prabhu* v. *Man Singh*, 1962 ALJ 631; *Jang Bahadur Singh* v. *Rai Nihore Singh*, A 1975 All 463), but an objection cannot be taken to its execution under section 47 (*Sathuranjan* v. *Guruswami*, 170 IC 86, A 1937 Mad 509), unless the minority is apparent on the face of the record (*Sitaram Reddy* v. *Chinnaram Reddy*, A 1959 AP 159). The Allahabad High Court in a similar case without going

3. The defendant described the plaintiff in the said suit as major, and the said decree was passed against the plaintiff as major.

The plaintiff claims that the said decree be declared null and void.

No. 274—Minor's Suit for Setting Aside a Decree on Ground of Irregularities *(v)*

1. The plaintiff was born in 1986 and is a minor and sues through a next friend Smt. Ramo, his mother.

2. The defendant brought a suit (being suit No. 105 of 1994) in this court, for the enforcement for a mortgage bond, dated May 10, 1988, alleged to have been executed by the plaintiff's father, Chandrabhan, in respect of joint family property belonging to the plaintiff and the said Chandrabhan.

3. There was no legal necessity for the said mortgage nor was it executed for the benefit of the estate or for the benefit of the plaintiff.

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into the question whether the judgment-debtor could or could not treat the decree as a nulity, allowed the execution objection to be treated as a suit under section 47(2) and gave a declaration that the decree was a nullity (*Daulat Singh* v. *Raja Ramji*, 24 ALJ 379, 98 IC 376 DB). But, in any case, a suit for declaration of the invalidity of such a decree is maintainable (*Rashid-uddin* v. *Md. Ismail*, 6 ALJ 688, 3 IC 864, 13 CWN 1182, 10 CLJ 318, 11 BLR 1225, 19 MLJ 621). In such a suit the decree can be set aside, without inquiring into any other fact (e.g., prejudice to the minor), even if the plaintiff had fully contested the suit and he himself was under the impression that he was major (*Champi* v. *Tara Chand*, 22 ALJ 665) or even if the decree was obtained on a compromise to which he was himself a party (*Ganganand* v. *Rameshwar Singh*, 102 IC 449 Pat). **All that he has to allege is that he was, at the time of the decree, a minor.**

A decree obtained against a major described as a minor is not a nullity and cannot be set aside unless it is shown that the defendant was prejudiced (*Hargovind* v. *Hukum Chand*, A 1924 All 94 DB; *Sarat Chandra* v. *Bibhabati Devi*, A 1921 Cal 584 DB). A decree obtained in favour of a minor without being represented by the next friend in the suit cannot be treated as nullity (*Raja Ram* v. *Naveen Chand*, 1995 RD 175, 1995 Lucknow Civil Decisison 622 All). Where a suit has been filled against a defendant without being represented by a guardian *ad litem*, no effectual or valid decree can be passed against the defendant (*Raja Ram* v. *Naveen Chand*, supra).

(v) If a minor is sued as minor, but either a proper person is not appointed as his guardian or there have been irregularities in the appointment of the guardian, e.g., there has been no formal order of appointment, or usual notices have not been sent or consent of the guardian to his apppointment has not been taken, or the interest of the guardian was adverse to the minor, the decree is not a nullity, and

4. The plaintiff was impleaded in the said suit as a defendant, and the said Chandrabhan was appointed as his guardian *ad litem*.

5. The interest of the said Chandrabhan was adverse to that of the plaintiff in the defence of the said suit, and he was not, therefore, a fit person to act as the plaintiff's guardian for the said suit.

6. The said Chandrabhan did not defend the suit on behalf of the plaintiff. [*Or*, The said Chandrabhan in his defence failed to plead that the mortgage had been executed without legal necessity and for no benefit to the estate or to the plaintiff].

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cannot be challenged in execution proceedings but can be set aside by a regular suit, if it is shown that the minor has been prejudiced (*Mahadeo* v. *Somnath*, 48 A 828; *Aramitta* v. *Audithrao*, 105 IC 537, 29 BLR 1357; *Phul Kuer* v. *Nahimunisa*, 125 IC 779; *Radhey Shyam* v. *Gopal Rai*, 169 IC 508, A 1937 All 374; *Brij Kishan* v. *Lal Narain*, A 1954 All 599; *Abhiman Singh* v. *Ram Hit Singh*, A 1958 All 437; *Umar* v. *Mahabir*, A 1940 Pat 59; *Madhusudhan* v. *Jogendra*, A 1945 Pat 133). When notice was given to natural guardian and court guardian was appointed, the decree passesd was null and void against the minor (*Judhisther Das* v. *Ekamra Chaudhry*, (1972) 38 CLJ 173). Complete disregard of the provisions of O. 32, R. 3(4) or R. 4(3) would make the order appointing a guardian *ad litem* for a minor, one without jurisdiction and the decree obtained against minor as null and void (*Amrik Singh* v. *Karnail Singh*, A 1974 P&H 315, following *Nirmal Chandra* v. *Khandu*, A 1965 Cal 562, and dissenting from *Ramchandra Singh* v. *B. Gopi Krishna*, A 1957 Pat 260). Where a defendant is minor, but no guardian is appointed for him, the suit is not legally instituted (*Alangadu Immudi Aghora S.A Mutt* v. *Sankarasubramaniam*, A 1990 Mad 76) When guardian has an interest adverse to minor, the decree passed by court is a nullity against the minor (*Jaya Singh* v. *Gangadharan*, 1973 KLR 434).

In *Balkrishan* v. *Topeshwar*, 15 CLJ 446, 14 IC 845; *Murlidhar* v. *Pitamber*, 20 ALJ 329; *Sellappa Goudan* v. *Masa*, A 1924 Mad 297, 76 IC 1018, 45 MLJ 675 DB, it was observed that when a father was appointed guardian of his minor son in a suit on a mortgage made by the father himself, his interest must be presumed to have been adverse and the decree should be set aside; but this view has since been modified in later cases and it has been held that even in such cases prejudice to the minor must be shown, e.g., by showing that the debt was not for a legal necessity (*Shaik Abdul Karim* v. *Thakurdas*, 113 IC 843, A 1928 Cal 844, 32 CWN 655 DB; *Sundar Lal* v. *Hari Har*, A 1937 All 552, 171 IC 36, 1937 ALJ 468; *Venkatasomeswara* v. *Lakshmanaswami*, 115 IC 801, A 1929 Mad 213 FB). In Bombay and Patna, the same view has been taken (*Chitradhar* v. *Khedar*, A 1938 Pat 437, 177 IC 886; *Mahadeo* v. *Shankar*, A 1943 Bom 387). In other cases, it may be necessary to go into the merits of the case, and the plaintiff should allege in the plaint both the irregularity as well as the prejudice, as the former without the latter, would give no cause of action (*Venkatachalam* v. *Paramasivam*, 104 IC 405, 52 MLJ 790, A 1927

7. The suit was decreed, on November 14, 1995, against the plaintiff also.

The plaintiff claims that the said decree be set aside as against the plaintiff.

No. 275—Like Suit, Another Form

1. The plaintiff is a minor of 15 years of age, and sues through his next friend Ram Pratap, his uncle.

2. The said Ram Pratap was appointed a guardian of the person and property of the plaintiff by the District Judge, Meerut, by an order, dated January 4, 1990.

3. In 1992, the defendant brought a suit in this (being suit No. 105 of 1992) court for arrears of rent for three years in respect of a shop.

Mad 668). Absence of a formal order of appointment of guardian is no more than a mere irregularity if the minor was in fact effectually represented (*Walian* v. *Banke Behari*, 30 Cal 1021, PC). If there was no effective representation the decree will be a nullity (*Khairajmal* v. *Daim*, 32 C 296, 9 CWN 201, 2 ALJ 71, 32 IA 23, 7 BLR 1; *Sardamani* v. *Rajendram*, (1981) 2 MLJ 166). The appointment of a person other than a certificated guardian, as guardian *ad litem* is also a mere irregularity and not an illegality (*Dammar Singh* v. *Pribhu Singh*, 4 ALJ 155). If a minor attains majority during the pendency of the suit but no amendment is made, a decree passed against him showing him as minor is not a nullity (*Ratan Prasad* v. *Birdhi Chand*, A 1939 Pat 601, 186 IC 298). When any question arises as to whether a person is bound by any decree or order passed during minority, the proper test is whether he was effectively represented in the proceedings leading to the decree or order in question as in justice, equity and good conscience to justify, in the circumstance of the particular case, the conclusion that he was party to those proceedings (*Ramadhar Singh* v. *Ram Suhat Singh*, A 1948 Pat 281).

If provisions of O. 32, R. 7, are completely disregarded and permission of court is not obtained for entering into a compromise on behalf of minor, the compromise decree is liable to be set aside at the instance of minor (*Mathura Singh* v. *Devdhari Singh*, A 1972 Pat 17; *Ved Prakash* v. *Ram Kishan*, A 1974 Punj 297). But if permission of court has been obtained, a compromise in a suit on behalf of minor cannot be challenged (*Gurcharan Singh* v. *Sukinder Singh*, A 1972 Punj 19). A compromise decree against a minor can also be avoided on the ground of negligence (*Bhubaneshwar* v. *Ujalamani Devi*, A 1980 Ori 181).

Result of setting aside a decree against a minor should not always be to wipe away the minor's liability altogether as that may give him an undue advantage. The parties should be placed in the same position in which they would have been had no irregularity occurred. If a minor was sued as major, and the decree is set

4. The defendant proposed the plaintiff's grandmother Smt. Ram Dei as a guardian *ad litem* of the plaintiff.

5. No notice of the said proposal of the defendant was served upon the plaintiff, and plaintiff had no knowledge of the said suit before it had been decreed.

6. The said Smt. Ram Dei was, at the time, a blind and deaf old woman of 90 and incapable of defending the suit on behalf of the plaintiff.

7. The said Smt. Ram Dei did not contest the suit and *ex parte* decree was passed against the plaintiff on November 14, 1992.

8. The rent of the said shop for the said period had been paid up by the plaintiff before the institution of the said suit and no part of it was in arrears.

The plaintiff claims that the said decree be set aside.

No. 276—Ditto, on Ground of Gross Negligence of the Guardian *(w)*

1. The plaintiff was born on November 20, 1977, and was a minor up to November 19, 1995.

2. On May 25, 1990, the plaintiff's mother Smt. Tulsa acting as plaintiff's guardian mortgaged to the defendant a house belonging to the plaintiff for Rs.53,000 borrowed by her to provide money for her brother Ram Singh to carry on a cloth shop.

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aside, the suit should be restored after removal of the defect (*Sunderlal* v. *Kr Harihar Sahai*, 1937 ALJ 468). If there was any irregularity in the appointment of a guardian, the proceedings should commence after the removal of the irregularity and proper appointment of the guardian (*Zuhara Begam* v. *Mt.Mashuq, Fatima,* A 1926 Oudh 32, 88 IC 175 DB; *Lakhanlal* v. *Sitaram*, 169 IC 513, A 1937 Nag 165; *Lokenath* v. *Beharee Lal*, 64 CLJ 497; *Monmohini Das* v. *Behari Shaha*, 40 CWN 1135, A 1936 Cal 421).

(w) If a guardian acted with gross negligence, as not setting up a valid available defence, the minor can have the decree set aside by a separate suit, although the gross negligence may not amount to fraud (*Chundura* v. *Rajam*, 70 IC 668, 45 M 425, A 1922 Mad 273, 42 MLJ 429 DB; *Ramalingam* v. *Venkatachalam*, A 1945 Mad 374; *Fazal Din* v. *Md. Shafi*, 10 IC 63 L; *Hanmantapa* v. *Jivabai*, 24 B 547; *Lala Sheo Charan* v. *Ramanandan*, 22 C 8; *Mahesh Chandra* v. *Manindra*, A 1941 Cal 401, 196 IC 77; *Sodamni* v. *Rajendran*, (1981) 2 MLJ 166). This is the minor's substantive right, which cannot be defeated merely because gross negligence is

3. In 1992, the defendant brought a suit (being suit No.205 of 1992) in this court against the plaintiff on foot of the said mortgage and the Head Clerk of this court was appointed guardian *ad litem* of the plaintiff.

4. The said Head Clerk grossly neglected his duties as such guardian by not putting forward the obvious defence that the mortgage having not been made for the benefit of the plaintiff was not binding on him, and by allowing an *ex parte* decree to be passed against the plaintiff in the said suit on November 15, 1995.

The plaintiff claims that the said decree be set aside.

No. 277—Suit by a Major for having a Decree Obtained against Him as Minor Set Aside.

1. The plaintiff was born in 1972 and was major in 1991.

2. On March 4, 1991, the defendant instituted a suit (being suit No.548 of 1991) in this court against the plaintiff for recovery of money said to be due to him on a bond alleged to have been executed by the plaintiff's deceased father Ramlal.

3. The defendant described the plaintiff in the said suit as a minor, and obtained an order for the appointment of one Prem Narain as guardian *ad litem* of the plaintiff.

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not mentioned in section 44 of the Evidence Act (*Iftikhar Husain* v. *Beant Singh*, A 1946 Lah 233). When decree against a minor is passed due to gross negligence on the part of his next friend, minor can avoid it, if it falls within the ambit of section 44, Evidence Act, in the proceeding in which it is sought to be relied, otherwise he may file a suit to get the decree set aside (*Asharafi Lal* v. *Kioli*, A 1995 SC 1440). A decree against a minor is void *ab initio* and a nullity, if it is passed in a suit in which no guardian is appointed for the minor or the appointment of the guardian is invalid or the validly appointed guardian does not properly represent the minor. To avoid such a decree it is not necessary to file a separate suit. It can be assailed in any proceeding whatsoever where this question may be relevant, provided, it is shown that the minor was not represented in the suit (*Inderpal Singh* v. *Sarnam Singh*, A 1951 All 823, 1951 AWR HC 91). For what is gross negligence, see *Mt. Siraj* v. *Mahomed Ali*, 138 IC 465, 1932 ALJ 437, A 1932 All 293; *Kali Charan* v. *Hirday Narain*, A 1935 Pat 24; *Hakim Bahauddin*, v. *Govind Singh*, A 1948 All 117. Omission to put forward a correct defence and putting an absurd defence amounts to negligence (*Subbaratnam* v. *Gunavanthalal*, 169 IC 694, A 1937 Mad 472).

The plaintiff must show that there was an available defence which, if raised and substantiated, would have led to a different result, and mere failure to appear

4. The said suit was decreed *ex parte* on July 20, 1995.

5. The plaintiff had no notice of the said suit or the said decree until February 4, 1996, and could not, therefore defend it.

The said suit was false, as the bond on which it was based had been satisfied by the plaintiff's father in his lifetime.

The plaintiff claims that the said decree be set aside.

No. 278—Suit for Setting Aside a Certificated Guardian's Transfer *(x)*

1. The plaintiff was born on January 20, 1971, and therefore attained majority on January 20, 1992.

2. One Raghubir Singh was appointed guardian of the plaintiff's property by order of the District Judge, Kanpur.

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and defend the suit does not amount to negligence (*Balbhadra* v. *Rangrao*, A 1937 Mad 846; *Pannalal* v. *Mohammed Zaki*, A 1937 Lah 563; *Sundar Lal* v. *Harihar Sahai*, 171 IC 36, A 1937 All 552). If the valid defence was raised by another defendant who fully fought out the case, the ommission of the guardian to raise the same defence was held not to justify the setting aside of the decree (*Profulla Kumar* v. *Beharilal*, 162 IC 804, A 1936 Cal 247). But if the guardian thought honestly that there was no valid defence his omission to defend is not negligence (*Visveswara* v. *Surya Rao*, 163 IC 712, A 1936 Mad 440). A guardian cannot be liable for counsel's dishonestly or negligence (*Daiva* v. *Selvaramanuj*, A 1936 Mad 479). The Bombay and Rajasthan High Courts have on the other hand, held that a decree cannot be set aside on the ground of gross negligence merely, apart from fraud or collusion (*Nana Nandeo* v. *Daipat Supadu*, 41 BLR 1280 A 1940 Bom 33, 186 IC 578; *Krisandas* v. *Vithoba*, 180 IC 51, A 1939 Bom 66, FB; *State* v. *R.D. Singh*, A 1972 Raj 241). In *Auraj* v. *Dalpat*, A 1937 Bom 464, it was held that in such cases the decree may be challenged in the same suit, e.g., under O.9, R. 13. But omission to raise a doubtful plea involving great legal uncertainty, or one on which there is divergence of authorities, cannot amount to gross negligence (*Venkataramamiyer* v. *Subramania*, 108 IC 639 M; *Ramalingam* v. *Venkatachalam*, A 1945 Mad 374).

Facts showing gross negligence must be alleged. If it consists in not setting up a valid defence, the plaint should show the defence which was valid and available.

Limitation : Three years under Article 113 from the date when negligence comes to plaintiff's knowledge.

(x) A transfer made by a *de jure* or legal guardian, e.g., a natural guardian, such as a Hindu mother, is considered to be the act of the minor and is valid until it is set aside at the instance of the minor (*Manmohan* v. *Bidhu Bhusan*, 185 IC 6, A 1939 Cal 460). On attaining majority the minor can either repudiate the transaction

3. The plaintiff was the owner of the property detailed at the foot of the plaint.

4. The said Raghubir Singh sold the said property to the defendant on October 20, 1989, with the permission of the District Judge, Kanpur.

5. The said permission was obtained by the said Raghubir Singh by a false representation that money was required to pay off two debts said to be due from the plaintiff's deceased father to Pran Sukh and Ratan Lal respectively. The plaintiff's deceased father had not taken any loans from Pran Sukh or Ratan Lal and nothing was, therefore, due to them or either of them, from the plaintiff. No part of the consideration of the sale of said property was applied to the plaintiff's benefit.

The plaintiff, therefore, claims:

(1) that the sale be set aside;

(2) possession of the property;

(3) mesne profits from date of suit to the date of possession.

No. 279—Suit for Setting Aside a Natural Guardian's Transfer

1. The plaintiff was born in October 1974 and attained majority in October, 1992.

2. The plaintiff was the owner of the property detailed at the foot of the plaint.

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as a whole or accept it. He cannot approbate and reprobate (*Hira Lal* v. *Bhikari*, 1973 MLJ 500). The transfer would be set aside if it was not made for a legal necessity or for the benefit of the minor or his estate. The transferee has to prove the necessity or benefit. He can also succeed if he can show that he had made *bona fide* inquiries and had satisfied himself of the existence of the necessity. But if the transfer is made not by a *de jure* guardian but any other person, even if that other person be the *de facto* guardian or manager, it is, according to Mohammedan Law, the act of an unauthorised person and is absolutely void and cannot be sustained even if there was any necessity for the transfer (*Imambandi* v. *Mutsaddi*, 47 IC 513, 45 C 878, 35 MLJ 422, 16 ALJ 800, 28 CLJ 409, 23 CWN 50, 20 BLR 1022; *Fateh Din* v. *Gurmukh Singh*, 10 L 385, 113 IC 227, A 1929 Lah 810 DB; *Mohammed Sultan* v. *Abdul Rahman*, 171 IC 876, A 1937 Rang 175; *Mohammed Moizuddin* v. *Nalini Bala*, A 1937 Cal 284; *Karam Chand* v. *Vali Mohd.*, 107 IC 310, A 1937 Sindh 157; *Karim Khan* v *Jaikaran*, 170 IC 543, A 1937 Nag 390; *Sambhlu* v. *Piyari*, A 1941 Pat 351, 193 IC 253). Such a transfer cannot be validated even by minor's ratification on

3. On November 20, 1987, Smt. Raj Kali, mother and natural guardian of the plaintiff, executed a sale-deed in respect of the said property in favour of the defendant and the defendant has been in possession of it ever since.

4. The said sale was not made for any legal necessity or for the benefit of the plaintiff.

Relief, as in the previous precedent.

No. 280—Suit for Property Transferred by a De-facto Guardian

1. The plaintiff was born in April 1973 and was a minor in 1987.

2. During the minority of the plaintiff, Muhammad Baksh, an uncle of the plaintiff, used to manage the plaintiff's property.

3. The property detailed at the foot of the plaint belonged to the plaintiff.

4. On Match 14, 1987 the said Mohammad Baksh wrongfully made a usufructuary mortgage of the said property in favour of the defendant who has been in possession ever since.

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attaining majority (*Anto* v. *Reoti Kuar*, 1936 ALJ 1099, A 1936 All 837 FB). Sale in consideration of barred debt is not binding (*Thadavarthi* v. *Myreni*, A 1946 Mad 198).

The act of a certified guardian is regarded as that of *de jure* guardian or any authorised person, only if he has acted with the permission of the court. The alienee is protected by the order of the court and is not bound to make any other inquiries unless it can be shown that the sanction was obtained by fraud or underhand dealing and that the alienee was party thereto (*Benares Bank Ltd.* v. *Dip Chand*, 160 IC 64, A 1936 All 172; *Brij Raj* v. *Alliance Bank of Simla*, A 1936 Lah 946; *Balaji* v. *Sadashiv*, 165 IC 530, A 1936 Bom 389; *Abbas Husain* v. *Kiran Shashi*, 1941 NLJ 447). Though the necessity should be recited in the court's sanction, mere omission of it cannot be pleaded to invalidate the sanction (*Balaji* v. *Sadashiv*, A 1936 Bom 389). But if the transferee is the creditor who ought to know the facts, the burden will be on him to justify the transfer (*Rajah* v. *Bishen Prasad*, 15 PLT 787). If he has made a transfer without such permission or in contravention of the permission, his act is the act of an unauthorised person and is not binding on the minor (section 30, Guardians and Wards Act; *Abbas Husain* v. *Kiran Shashi*, 1941 NLJ 447, A 1942 Nag 12). It is not void in the sense that it can be treated as a nullity by any person, but it can be treated as a nullity *at the option of the minor*, and need be set aside by him within three years (*Nagendra* v. *Mohini*, 34 CWN 948). A plaintiff in such a

5. The net profit of the said property, as shown in the account given at the foot of the plaint, are Rs.14,000 a year.

The plaintiff claims:

(1) Possession of the said property.

(2) Rupees 42,000 on account of mesne profits for the last three years.

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case should restore the benefit which he has received under the transfer, before the transfer can be set aside (*Jai Narain Lal Tandon* v. *Bichoo Lal*, ILR 1938 All 614, 176 IC 369; *Abbas Husain* v. *Kiran*, A 1936 Bom 389; *Gondulal* v. *Abdus Sattar*, A 1948 Nag 353). But if it cannot be shown that he had been benefited by the purchase money, no order of refund should be made (*Venkatarama* v. *Sobhanadri*, 40 CWN 545, 161 IC 29, A 1939 PC 91) Defendant is not, however, entitled to interest on the money ordered to be refunded and plaintiff is entitled to receive profits from the date of sale (*Rahima* v. *Amathul*, 161 IC 522, A 1936 Mad 140). Cases can be conceived in which court will not, in its discretion allow refund, e.g., when transferee was cognizant of the minority and the minor was not guilty of fraud or misrepresentation (*Mt. Bachai* v. *Hayat Mohammad*, A 1940 Oudh 119). But if transfer is made by a relation who cannot be a natural guardian and who is neither a certificated guardian nor a *de facto* guardian as he neither lived with the minor nor managed his property, the transfer is void as he had no authority to make it (*Kalipada* v. *Purnabala*, A 1948 Cal 269. *Athiappa Gounder* v. *Mohan*, (1995) 1 Mad L J 357 (DB) Mad).

After the passing of Hindu Minority and Guardianship Act, 1956, the guardian of Hindu minor has power to do all acts which are necessary or reasonable and proper for the benefit of the minor or for realisation, protection or for benefit of minor's estate. This power applies even to a contract for purchase of immovable property. The liability to pay money is the liability of the minor under the Transfer of Property Act and not on account of any personal covenant and so such a contract is not excluded under section 8(1). The contract is enforceable (*Manak Chand* v. *Ram Chandra*, A 1981 SC 519, (1980) 4 SCC 22). However, under section 11 of the Act a *defacto* guardian of a Hindu minor is not entitled to dispose of or deal with the property of a minor.

There is also a difference between the remedies of the minor in the two cases. If the transfer was by an authorised person, e.g., by a natural guardian or by a certificated guardian acting under permission it is considered to be the act of the minor himself, and the minor must bring a suit to have it set aside within three years of attaining majority (Article 60), before he can recover the property. He cannot be permitted to succeed in a suit for possession, treating the transfer as nullity, brought after three years (*Fakiratpa* v. *Lumana*, 44 B 742; *Labba Mal* v. *Malak Ram*, A 1925 Lah 619; *Babu Ram* v. *Saidunnisa*, 11 ALJ 783). But if the transfer was made by an unauthorised person or by a certificated guardian without, or in contraven-

(3) Future mesne profits from the date of suit to that of possession.

No. 281—Suit for Property Transferred by a Certificated Guardian Without Permission

1-3. *same as in precedent No. 278.*

4. The said Raghubir Singh usufructuarily mortgaged the said property to the defendant by a mortgage-deed, dated October 20, 1987 without the permission of the District Judge.

(*Or*, In contravention of the permission granted by the District Judge : the District Judge had permitted a usufructuary mortgage for Rs.5,000 for 7 years on the condition that the principal and interest should be

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tion of the permission of the District Judge, the transfer can be treated by the minor as nullity and a suit could be brought by him for possession without a prayer for having the transfer set aside, within 12 years provided by Article 144 (corresponding to Article 65 of the Act of 1963) (*Matadeen* v. *Ahmad Ali*, 9 ALJ 215 PC; *Imambandi* v. *Mustsaddi*, 16 ALJ 800 PC; *Rahman* v. *Sukh Dayal*, 2 ALJ 567; *Mahadeo* v. *Samaji*, 99 IC 1050, A 1927 Nag 145; *Ponnammal* v. *Gomathi*, 165 IC 287, A 1936 Mad 884; *Kali Charan* v. *Sudhir*, A 1985 Cal 66). The Allahabad High Court has held that even a natural guardian's transfer can be treated as nullity and a suit for possession can be brought within 12 years (*Bachan Singh* v. *Kamta Prasad*, 7 ALJ 33; *Lallo Singh* v. *Jamna Prasad*, A 1940 All 320, 189 IC 372). **The plaint must specify the exact position of the person who had made the transfer and must allege fact showing how his act is not binding on the plaintiff.**

Mesne Profits: If the transfer was made by wholly an authorised person, the plaintiff can recover mesne profits up to a maximum period of three years. But if it was made by a legal guardian, this can be claimed from the date of repudiation. If there was no repudiation prior to suit, he can get profits from the date of suit only (*Bhirgu* v. *Nar Singh*, 14 ALJ 1161). A transfer by a certificated guardian without permission is only voidable at the option of the minor under section 30 hence the latter can claim profits only from the date of repudiation. The transferee can get compensation for improvements if made before he had notice of repudiation (*Venkataraman* v. *Ponnusami*, 106 IC 131, A 1927 Mad 1023 DB; contra *Bechu* v. *Bhabuti*, 124 IC 731).

Limitation is three years under Art. 60 from the date that minor attains majority, whether the guardian is appointed by court or not (*Dipchand* v. *Munnilal* 27 ALJ 1248, A 1929 All 879 DB). This will be so in all cases when the transfer is not void even though there is no prayer for setting aside the sale (*Sri Raja Sobhanadri* v. *Raja Muganti*, 129 IC 245, A 1931 Mad 45, 1930 MWN 1067, 60 MLJ 701, 54 M 352). In case of several Hindu minor sons of a mother who had made the transfer, a suit brought more than 3 years after the eldest son attaining majority was held to be

satisfied within that period. The said Raghubir Singh made the mortgage for Rs.5,000 without any fixed term at an interest of six per cent per annum).

5. The plaintiff repudiated the said mortgage by a registered notice sent to the defendant on March 10, 1994.

The plaintiff claims:

(1) Possession of the said property.

(2) Rs.1,600 on account of mesne profits for 2 years, from March 10, 1994 at Rs.800 a year.

(3) Future mesne profits.

No. 282—Suit against Minor's Property for Price of Necessaries Supplied to the Minor *(y)*

1. The defendant is a minor.

2. Between October 18, 1995 and November 20, 1995 the plaintiff supplied to the defendant at his request various commodities, the particulars of which, with their price are fully set out in schedule A appended to the plaint, which should be deemed to be part hereof.

3. The commodities mentioned in the preceding paragraph were articles of daily necessity of the defendant and his wife and were suited to the defendant's position and condition in life.

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barred as the eldest being manager could sue for all (*Annia Pillai, In re*, 165 IC 656, A 1936 Mad 914). A suit to recover property conveyed under a transfer which is void, e.g., transfer by a *de facto* guardian without necessity is governed by old Article 144 (*Kailash* v. *Rajani* A 1954 Pat 298) now Article 65.

(y) Such a suit lies under section 68, Contract Act. The "necessaries of life" mentioned in that section are not restricted to the elementary necessities such as food and clothing but include other pressing necessities, e.g, payment of government revenue (*Mohammed Ali* v. *Chinku*, A 1930 All 128), meeting the expenses of the marriage of the minor himself or of any one whom he is legally bound to maintain and get married (*Phathak* v. *Ram Din*, 2 Pat LJ 627). The term has been held to include also cash needed to effect repairs in minor's house (*Ram Chandra* v. *Hari*, A 1936 Nag 12), or to perform necessary religious ceremonies (*Maharam* v. *Vadilal*, 20 B 61), or cost incurred in defending a suit to save minor's property (*Watikins* v. *Dhunnoo*, 7 C 140); or in defending himself in a criminal prosecution (*Sham* v. *Choudhri*, 21 C 872); or providing a house for living and continuing his studies (*Kunwarlal* v. *Surajmal*, A 1963 MP 58). Advances made for the marriage of a Hindu male minor would be a necessity (*Kalicharan Ram* v. *Ram Devi Ram*, A 1917

4. Out of the price of the said commodities the defendant has paid Rs.260 only and Rs.3,790 are still due from him as per account given in the said schedule A.

5. The government revenue of villages Radauli and Charka belonging to the defendant for *kharif* 1402 *fasli* fell into arrears and the movable property of the defendant was attached by the Tahsildar. The plaintiff advanced Rs.1,300 to the defendant on January 30, 1996, for payment of the said government revenue.

The plaintiff prays for a decree for the recovery of Rs.5,090 with costs and interest at 12 per cent per annum from the date of suit, from the moveable and immovable property of the defendant.

No. 283—Ditto, on the Basis of Contract by his Guardian *(z)*

1. The plaintiff is the widow of one X, a Hindu who died in 1960, leaving his son Y.

2. The said Y died in 1965, leaving a widow.

3. The said widow adopted the defendant as a son.

4. The defendant was on the date of adoption a minor and continued to be so up to the 1st October 1988.

5. During the defendant's minority his natural father Z acted as the guardian of his property.

6. On the 20th October, 1986 the said Z acting as such guardian executed a deed of maintenance in favour of the plaintiff, agreeing on behalf of the defendant to pay her a maintenance allowance of Rs.250 per month.

7. The defendant has not paid the plaintiff anything on account of maintenance since he has attained majority and three years allowance from the October 1, 1988 is in arrears.

Pat 332). Similarly marriage of a minor muslim girl is a necessity that would come within the purview of secion 68 (*Rahima Bibi* v. *A.K. Sherfuddin*, A 1947 Mad 155).

Defence : That he did not need the money or that the guardian did not apply it to his needs.

(z) Ordinarily a guardian has no power to bind a minor by a purely personal contract, but if by such contract the guardian incurs an obligation for which the estate of the minor is already liable under the personal law, such contract can be

The plaintiff claims Rs.9,000 with interest from the date of suit from the estate of the defendant.

TRUSTS

No. 284—Suit by a Specific Legatee against an Executor for his Legacy

See Precedent No.246

No. 285—Suit for Execution of Trusts

(Form No.44, Appendix A, C.P.C.)

1. AB is one of the trustees under an instrument of settlement, bearing date on or about the ___ day of _____, made upon the marriage of EF and GH, the father and mother of the defendant [*or*, an instrument of transfer of the estate and effects of EF for the benefit of CD, the defendant, and the other creditors of EF].

2. AB has taken upon himself the burden of the said trust, and is in possession of [*or*, of the proceeds of] the movable and immovable property transferred by the said instrument.

3. CD claims to be entitled to a beneficial interest under instrument.

4. The plaintiff is desirous to account for all the rents and profits of the said immovable property [and the proceeds of the sale of the said, *or* of part of the said, immovable or movable property, or the proceeds of the sale of *or* of part of the said movable property, *or* the profits accruing to the plaintiff as such trustee in the execution of the said trust]; and he prays that the court will take the accounts of the said trust, and also that the whole of the said trust-estate may be administered in the court for the benefit of the said CD, the defendant and all other persons who may be interested in such administration, in the presence of CD and such other persons so interested as the court may direct, or that the said CD may show good cause to the contrary.

[N.B.—Where the suit is by a beneficiary, the plaint may be

enforced against the minor's estate. For instance, if a minor is liable for maintenance of his mother, a guardian's contract to pay for a maintenance allowance can be enforced against his estate (*Kondpali* v. *Putta*, A 1943 Mad 487, 1943 MWN 266). See the Calcutta case relating to reconveyance of minor's property, *Radheyshyam Kamila* v. *Smt. Kiran Bala Dasi*, A 1971 Cal 341).

modelled, mutatis mutandis, *on the plaint by a legatee, viz. Precedent No.246].*

No. 286—Suit Under Section 92, C.P.C. *(aa)*

1. The defendant No.1 dedicated the property detailed in schedule A attached to the plaint, by a deed of trust dated July 4, 1957, in trust, for the following charitable object:

(a) Establishing and maintaining a vocational and technical school at Jaunpur;

(b) maintaining the temple known as the Seth's temple at Jaunpur, and defraying the expenses of *bhog* of the idol and the pay of the temple servants; and

(c) paying one-fifth portion of the net income of the said property to the Hindu orphanage at Varanasi.

2. By the said deed of trust, the said defendant No.1 appointed himself and defendants No.2-10 as trustees for carrying out the objects of the said trust and appointed himself as the managing trustee.

(aa) A suit under this section can be brought only with the leave of the court or by the Advocate-General, whose functions are exercised, outside the Presidency towns, by Collectors or other officers nominated by the State Government, (section 92 C.P.C.). But any suit which is outside the scope of this section may be brought by anyone in his private capacity or under O. 1, R. 8. The scope of the section should, therefore, be clearly understood. It applies when (i) the suit is not only in the interest of the plaintiff individually but in the interest of the public or in the interest of the trust itself; (ii) the suit relates to a trust for a public purpose of a charitable or religious nature; (iii) a breach of trust has been committed or directions of the court are deemed necessary for its administration; and (iv) one or more of the reliefs mentioned in section 92 is sought. Relief (h) of section 92, though worded in general terms should be *ejusdem generis* with the other reliefs. A relief directing account to be taken of the trust income and payment of the amount found due can be claimed (*Thushtu* v. *V. Krishnamurthi*, 100 IC 841, 52 MLJ 182, 1927 MWN 202, 38 MLT 143), but it is not obligatory on the court to direct accounts on the removal of a trustee (*Faizunnessa* v. *Moulvi Asad*, 41 CWN 298). Under the new sub-section (3), added by the Amendment Act of 1976, the original purpose of the trust can also be altered by applying the doctrine of *cy-pres (Ram Sarup* v. *Union of India*, A 1985 Del 318). A private trust is outside the operation of section 92 (*Chandra Warrier* v. *M.S.S. Narayogam*, 1991 (1) Ker LT 387).

A suit for *mere declaration that property is* trust property or that the plaintiff

3. The defendant No.1 has, since the date of trust, been in possession of the said property as such managing trustee, but has not applied any part of the income to any of the objects of the said trust but has appropriated the whole of it to his own use. The other defendants have taken no steps to compel the defendant No.1 to carry out the object of the said trust.

4. By a deed of sale, dated January 14, 1996, defendant No.1 has wrongfully sold as his private property the house in Jaunpur detailed in schedule B attached to the plaint, being part of the trust property specified in schedule A to defendant No.11.

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is the trustee or is entitled to act as *mutwalli* is not covered by section 92 (*Jamal-ul-din* v. *Mujtaba*, 25 A 681; *Badri Das* v. *Chunni Lal*, 33 C 789; *Ram Das* v. *Hanumantha*, 36 M 364; *Miram Baksh* v. *Allah Baksh*, 99 IC 756 L; *Abdul Rahim* v. *Mohammed Barkat*, 55 C 519; *Ram Rup* v. *Sarm Dayal*, 160 IC 289, A 1936 Lah 283; *Shadi Ram* v. *Ram Kishan*, A 1948 East Punjab 49; *Mt. Khurshid Jahan* v. *Ram Qamali*, A 1947 Oudh 17), nor a suit for declaration of the validity of a trust (*Hafiz Mohammad* v. *Swarup Chand*, A 1942 Cal 1), nor a suit for ejectment of a trespasser from the trust property (*Acharya Guru* v. *Mahant Ramdhari*, A 1925 All 683, 23 ALJ 601; *O. Rm. O.M. Sp.Firm* v. *P.L.N.R.M. Nagappa*, A 1941 PC 1, 192 IC 1; *Govind Chunder* v. *Abdul Majid*, A 1944 Cal 163). Disputed questions of title cannot be gone into in such a suit (*Kalimala* v. *Mukerji*, A 1962 SC 1329). A suit primarily to vindicate the individual or personal rights of the plaintiff or of a third person is outside the purview of section 92 (*Kabul Singh* v. *Ram Singh*, A 1986 All 75). A suit for accounts by one trustee against another (*Sanmukhan Chettey* v. *Govind Chetty*, 1937 MWN 849; *Gurunathaswami* v. *Alangaram*, A 1939 Mad 594; *Balkishan Das* v. *Parmeshwari Das*, A 1963 Punj 187), or by trustees against past trustees (*Indu Bhushan* v. *Kiron Chandra*, A 1940 Cal 376, 44 CWN 327) is not covered by section 92, nor is one for an injunction restraining the defendant from dealing with *waqf* property in a manner opposed to the intention of the founder of the trust (*Nibal Shah* v. *Malan*, 99 IC 755, 2 LLJ 457), nor a suit for a declaration that the plaintiff is entitled as founder of the trust to appoint new trustees in place of deceased trustees (*Ruggan Prasad* v. *Bhanno* 99 IC 1045 A), nor a suit by the idol through a worshipper for declaration of title and possession of trust property even if *shebait* is acting adversely to the interest of the idol (*Bishwa Nath* v. *Thakur Radhe Ballabhji*, A 1967 SC 1044; *Pragdasji Guru Bhagwandasji* v. *Ishwarlalebhai Narsibhai*, A 1952 SC 143). Nor a suit by certain person on behalf of villagers for a declaration that an alienation by the *pujari* is void (*Sri Veerobhadraswami* v. *Maya Kone*, A 1940 Mad 81); nor a dispute between beneficiary and the trust (*Mt. Shabjehan* v. *Ibn Ali* A 1954 All 69). But when, on the death of trustees nominated by the creator of trust an adverse claimant takes possession of trust property and repudiates the trust, a suit for appointment of new trustees and for settling a scheme of administration is maintainable (*Eralappa* v. *Bala Krishinath*, 102 IC 74).

5. Plaintiff No.1 is the *pujari* of the said Seth's temple at Jaunpur, and plaintiff No.2 is the manager of the Hindu orphanage at Varanasi and as such both have an interest in the said trust and have obtained the leave of the court for institution of the said suit.

The plaintiffs pray for a decree :

(1) Declaring that the sale of the said house in favour of defendant No.11 is null and void.

But if a declaration is involved in the other reliefs the same can be given, e.g., in a suit to which alienee of trust property is impleaded, a declaration that the alienation is void may be made alongwith the decree removing the trustees and appointing new one (*Lachman Prasad* v. *Munia*, A 1925 All 759 DB. *Mufti Ali Joffir* v. *Fazal Hussain*, 20 ALJ 557), a declaration that the property is trust property can be granted against creditors of the trustees or transferees of the alleged trust properties claiming the property in their own right, though ordinarily no relief should be granted to third parties in a suit under section 92 (*Janki Pd.* v. *Kubber Singh*, A 1963 All 187). But a relief for ejectment of a lessee cannot be claimed (*Fayunessa* v. *Moulvi Assad*, 41 CWN 298). In a suit for settlement of a scheme for *dargah*, the *mutwali* in management is a necessary party and also a near relation of the founder of the trust eligible under the terms of the trust to be a trustee (*Lal Suresh Singh* v. *Legal Rememberancer to Govt. U.P.*, A 1937 Oudh 229, 167 IC 828). A suit for the removal of a self-constituted trustee on the ground of misconduct and misappropriation is one within section 92 (*Ramdas* v. *Kishan Prasad*, A 1940 Pat 425). A suit can also be brought under this section for removal of a *Mahant* both from trusteeship of property and also from spiritual duties, if the two duties, are inter-dependent and inseparable (*Satish Chandra* v. *Dharnidhar*, A 1940 PC 24). A suit to compel trustees to cease spending *waqf* income on secular objects and to apply entire income to religious purposes is within section 92 (*Haji Md. Nabi* v. *Province of Bengal*, A 1942 Cal 343). A suit for revision of a scheme sanctioned by a decree under this section must be brought under this section and not independently (*Baba Surajgir* v. *B.Brahma Narain*, A 1946 All 148).

The word " interest in the trust" in section 92 of the C.P.C. must be interpreted to mean some such interest as is affected by mismanagement so that the person is interested in having affairs of the trust set right by court (See case law in *P. Sivagurunatta Pillai* v. *P. Mani Pillai*, A 1984 Mad 128).

Where a Mohammedan makes a *waqf* known as *waqf-alal-aulad* with the ultimate benefit reserved for a public purpose even though the public may have no chance of being benefited while anyone in the family of the *waqf* is alive, it will be difficult to hold that the *waqf* is a private *waqf*. It would be a public trust in respect of which a suit could be filed under section 92, C.P.C. (*Farman Ali Khan* v. *Mohd. Raza Khan*, ILR 1950 All 985, 1949 ALJ 453; *Sugra Bibi* v. *Haji Kummu*, A 1969 SC 884). The Wakf Act applicable to the state concerned should also be

(2) Removing the defendants Nos.1 to 10 from the office of trustees.

(3) Appointing new trustees and vesting the trust property in them.

(4) Directing account to be taken from defendants Nos.1 to 10, of the income of the trust property and payment of the balance to the new trustees.

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consulted as many powers of courts have now been vested in the Wakf Boards (*Khalil Ahmed* v. *Siddiq Ahmad*, A 1974 All 382).

The essential feature of a public trust which is contemplated by section 92 C.P.C. is that the endowment must be for a public purpose of a charitable nature and that the beneficial interest in it must be vested in the public in general or in a considerable section of the public. Such endowments are meant to last for ever. In the case of private trusts, on the other hand, the beneficial interest would be vested in one or more ascertainable individual (*Dhirendra Singh* v. *Dhanai*, A 1983 All 216; see also *Ram Saroop Dasji* v. *S.P. Sahi*, A 1959 SC 951; *Devki Nandan* v. *Murlidhar*, A 1957 SC 133).

A place in order to be a Public temple, must be a public place for public religious worship used as such place and must be either dedicated to the community at large or any one thereof as a place of public religious worship. In case of private temple, the beneficiaries are specific individuals while in public temple, they are indeterminate or fluctuating general public or a class thereof (*Bala Shankar Maha Shankar Bhattjee* v. *Charity Commissioner*, 1995 Supp (1) SCC 485 at 496. A 1995 SC 1397).

A suit under section 92, C.P.C. is a suit of special nature which pre-supposes the existence of a public trust of a religious or charitable character. Such a suit can proceed only on the allegation that there is a breach of such a trust or that directions from the court are necessary for the administration thereof and it must pray for one or other of the reliefs that are specifically mentioned in the section (*Gheevergheshe Koshy* v. *Chacko Thomas*, A 1963 Ker 191; *Sanat Kumar Mira* v. *Hem Chandra*, A 1961 Cal 411).

A scheme once settled by the court cannot be altered even by the court except only on substantial grounds (*Ahmad Adam* v. *M.E.M. Makhri*, A 1964 SC 107). It is true that changes in times and circumstances may *ex-debito justitii* require that alterations should be made in the scheme to carry out the objects of the endowment and to see that the scheme operates beneficially. No separate suit is necessary for making such alterations. The same can be made by an application where the scheme originally settled contains a clause to that effect (*Raje Anandrao* v. *Shamurao*, A 1961 SC 1206). The court is not powerless to modify the scheme even where the relevant clause has due to change in circumstances become unworkable (*Elias* v. *Elias* 1986 Ker LT 72; distinguished *Chemeli Bibi* v. *Kanhaiyalal*, A 1973 Cal 328, and dissenting from *Rangaswami* v. *Rajagopalayam*, A 1977 Mad

(5) Directing the new trustees to apply the income of the said property to the different objects of the trust according to the directions in the deed of trust.

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287). At the same time the court has always to exercise caution in this matter and to see that what has been done by the court is not disturbed except when there are substantial grounds for doing so and where satisfactory evidence to sustain those grounds is brought before the court. The paramount consideration must, of course, be the interest of the charity (*Shrinivas R Acharya* v. *Purshottam Chatarbhuj*, 55 BLR 497).

The trustees mentioned in section 92 need not be *de jure* trustees. *De facto* trustees will sufficiently attract the operation of the section and can be removed (*Ramesh Chandra* v. *Gulap Rai*, A 1980 All 283). Ordinarily, *de facto* trustees cannot claim any rights in respect of the trust, but if they had been in *bona fide* possession for sometime they could be allowed to preserve trust property from trespassers (*Vikramdas* v. *Daulat Ram*, 1956 ALJ 434 SC). Cost of the plaintiff in a suit under section 92 can be awarded out of the trust funds (*Waraes Ali* v. *Sheikh Samsuddin*, 63 CLJ 573).

A suit which falls under section 92 cannot be instituted except under that section or, in the case of a religious endowment of a public nature, under section 14, Religious Endowments Act, while one which does not so fall may be instituted in the ordinary way, e.g., a suit to enforce a private right. A worshipper at a temple has a right to bring a suit to restrain waste of, or encroachment upon the trust property by the trustees, the primary right of interested persons in such cases is to sue for removal of the trustees, but they may also be allowed to waive that right and to sue under O. 1, R. 8, for the removal of encroachment made by the trustees (*Dr Mukandlal* v. *Mohan Lal*, 101 IC 744).

A suit for the reliefs mentioned in section 92 without sanction cannot be cured by amendment and abandonment of such reliefs (*Gajramaji* v. *Som Nath*, A 1950 Bom 242 DB).

In a plaint under this section, **the nature of the trust, the plaintiff's interest in it, the breach of trust or other reason for the suit and the specific reliefs claimed should be clearly alleged.** Under section 92, C.P.C. it is not necessary that a person should have a direct interest to enable him to institute a suit but at the same time the right of suit is restricted to those persons who have a present and substantial interest and not a remote or fictitious or illusory interest (*Farman Ali Khan* v. *Md. Raze Khan*, 1949 ALJ 463). The suit cannot be brought by less than two persons, but on the death of one, may be carried on by the other (*Ram Gulam* v. *Shyam Sarup*, 50 A 687, 1933 ALJ 1393; *Bapiraju* v. *Ramchandra*, 146 IC 628, 1933 MWN 1286, 65 MLJ 690, A 1931 Mad 854). A relief not covered by the section should not be claimed, e.g., ejectment (*Brindaban* v. *Mt. Wanti*, 144 IC 168, A 1933 Lah 395); but if one is claimed the whole suit is not rendered bad (*Devi* v. *Alpati*, 106 IC 134, 1927 A Mad 1033). Such a suit should be instituted in the principal civil

No. 287—Suit by Beneficiaries for Ejectment of a Trespasser Impleading Trustee *(bb)*

1. There is in the village of Shamspur a mosque called the Sunehri Masjid to which certain shops and lands, which include the land specified at the foot of the plaint, are attached.

2. The said mosque, lands and shops are *waqf* property for the benefit of all Muslims and defendant No.2 is the *Mutwalli* of the said *waqf*.

3. The plaintiffs are Muslim residents of the village Shamspur and congregate, along with other Muslim residents of the village, in the said mosque for offering prayers.

4. Defendant No.1 has, on or about the 3rd February 1996 unlawfully taken possession of the land specified at the foot of the plaint and has built a wooden structure thereon and opened a tea shop.

5. The plaintiff served a notice on defendant No.2 requiring him to eject defendant No.1 and recover possession of the said land, and defendant No.2 has replied that the land is not *waqf* property but belongs to him and that he has let it out to defendant No.1.

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court of original jurisdiction (which is usually the court of District Judge) or any other court specially empowered by government to try such suits. To an appeal from an order under section 92, District Judge should not be joined as a respondent (*Sahdevachari* v. *District Judge, Benares*, A 1933 All 151, 144 IC 701 [1]). All persons interested in the relief claimed must be impleaded as defendants. The court should itself implead any such person omitted, e.g., an alienee of trust property denying the trust (*Anjaneya* v. *Kothandapani*, 164 IC 615, A 1936 Mad 449).

Limitation: Under section 10 Limitation Act there is no limitation for a suit for declaration that property in possession of *mutwalli* is *wakf* property (*Md. Shah* v. *Fasihuddin*, A 1956 SC 713).

(bb) Though ordinarily all suits for recovery of endowed property from trespassers must be instituted by the trustee or *mutwalli*, there is nothing to prevent any beneficiary, e.g. a worshipper at a temple or mosque from instituting any such suit when the trustee either sets up a hostile title or neglects or refuses to sue. The relief may be either declaration that the property is a trust property or injunction or ejectment and recovery of possession, as may be required (*Ettyat Ahmad* v. *Vayalkuth*, 173 IC 586, A 1937 Mad 819). When there is a trustee, it would be proper to implead him as a defendant, but the deity is not a necessary party (*Monindra Mohan* v. *Shamnagar Jute Factory*, 43 CWN 1056, A 1939 Cal 699, 186 IC 25). *De facto* manager or trustee *do son tort* can also sue for recovery of property on behalf

The plaintiff, therefore, claims:

(a) declaration that the land specified at the foot of the plaint is *waqf* property and not the private property of defendant No.2;

(b) ejectment of defendant No.1 from the said land.

No. 288—Suit Under Section 14 Religious Endowments Act *(cc)*

1. The temple known as the temple of Sri Girdhar Gopal Ji in the town of Mathura was built about in the year 1950 by one Seth Kishorilal of Agra, who dedicated considerable movable property and jewellery to the deity and endowed considerable immovable property for the expenses and upkeep of the said temple, and by a deed of endowment, dated August 15, 1951, directed, among other things, that out of the income of

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of the trust (*Gopal* v. *Mohd. Jaffar*, A 1954 SC 5; *Vikram Das* v. *Daulat Ram*, A 1956 SC 382; *Bishwanath* v. *Radha Ballabhji*, A 1967 SC 1044). Even a worshipper (*Vemaraddi* v. *Konduru*, A 1967 SC 436; *Bhagwati Prasad* v. *Laxminathji*, A 1985 All 228) or pujari (*Mahajan* v. *Gopinath*, A 1986 Pat 3) can maintain a suit to challenge an alienation made by a *shebait* against the interests of the deity. In case of a suit for recovery of trust property from a trespasser it is not necessary that actual possession should be given to the plaintiff. The court can, after making a declaration, direct that possession be delivered to the trustee as such and when there is no trustee the court can direct possession to be delivered to the plaintiff on behalf of the trust (*Rangaswami* v. *Krishnaswami*, 71 IC 463, A 1923 Mad 276, 1923 MWN 84 DB). Such a suit need not be a representative suit but may be instituted by any beneficiary without even impleading any other beneficiary (*Fabimol Haq* v. *Jagat*, 74 IC 403, A 1923 Pat 475 DB).

(cc) In respect of public religious establishments such as mosques and temples, section 14 of this Act provides an alternative remedy to that provided by section 92 C.P.C. Such a suit can be brought against the trustee, manager or superintendent of a religious establishment or against the members of any committee appointed under the Religious Endowments Act in respect of the trust vested or confided to them respectively (*Sarjoo* v. *Ajodhiya Prasad*, A 1979 All 74). There is no reason to restrict the applicability of sections 14 and 18 of Religious Endowments Act of 1863 only to endowments which were in existence on that date (*Bhagwan Das* v. *Moti Chand*, A 1949 All 612). The plaintiff should show in the plaint (1) that he is interested in the religious establishment or in the performance of the worship or service therof or in the trust relating thereto; (2) that the defendant has committed any misfeasance, breach of trust or neglect of duty in respect of the trust vested or confided to him; (3) the relief claimed, which may be specific performance of any act by the defendant, damages, or removal of the defendant from the

the endowed property, Rs.2,000 a month should be spent on the upkeep of a *pathshala* or a small school for religious teaching which had been opened by him in part of the said temple, and Rs.1,200 be spent on *rajbhog* for offering of food to the deity.

2. By the said deed of endowment, the said Seth Kishorilal appointed his son Raja Ram as sole trustee of the said temple and property and directed that after the said Raja Ram's death, his eldest son should be the trustee.

3. The defendant being the eldest son of the said Raja Ram has been the trustee and manager of the temple and the endowed property since 1980.

4. The defendant has been guilty of the following acts of misfeasance and breach of trust :

(a) He has disposed of or converted to his own use the article of jewellery mentioned in schedule A, attached to the plaint, which should be treated as part hereof, which had been dedicated by Seth Kishorilal for the use of the idol.

(b) During the time of Seth Kishorilal and Raja Ram's trusteeship two teachers were employed for the *pathshala* at Rs.500 and Rs.300 per month respectively, and 16 scholarships of Rs.50 were given to the students. The defendant has, within a year of his taking over charge, dismissed the senior teacher and since then only one teacher on Rs.300 per month has been employed and only 6 scholarships have been

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office of trustee or manager or superintendent, but not appointment of a new trustee (*Sada Shankar* v. *Hari Shanker*, 5 ALJ 191); or rendition of accounts of the trust property (*Ram Narain* v. *Jai Narain*, A 1961 All 125; *Chief Inspector of Stamps* v. *Ramesh Chandra Ghetak*, A 1956 All 189). For any other relief e.g., a suit for framing a scheme for the management of the temple a suit under section 92 C.P.C. will be necessary (*Sitharama Chettey* v. *Subramaniya Iyer*, 39 Mad 700). The trustee, manager or superintendent who can be sued, should according to the Allahabad High Court, be one appointed under the Act (*Sher Khan* v. *Bhura Shah*, A 1935 All 273); but the Calcutta High Court has in one case held that only hereditary trustees under section 4 can be sued under section 14 (*Bhima* v. *Dashrathi*, 40 Cal 323), while in other cases it has been held that sec. 14 applies to trustees, whether hereditary or selected (*Mohammed Athar* v. *Ramjan Khan*, 34 Cal 587; *Badar Rahim* v. *Badhshah Mia*, 62 Cal 125). The Madras High Court takes the latter view (*Mathur* v. *Ganathora*, 17 Mad 95).

given, with the result that the *pathshala* has become unpopular and attendance has fallen to less than half.

(c) The temple building was not properly repaired with the result that the roof of the big front hall used as a waiting hall for the visitors fell down 4 years ago and the hall was totally ruined 3 years ago.

5. The plaintiff is a Hindu resident of Mathura and is interested in the temple as a daily worshipper at it.

The plaintiff claims :

(1) That the defendant be removed from the office of the trustee;

Or

(a) that the defendant be directed to appoint a senior teacher for the *pathshala* on a pay of at least of Rs.500 per month and to allow at least 16 scholarships to the students; and

(b) that the defendant be directed to rebuild out of the trust funds the big front hall of the temple just as it was before its roof fell down.

For the interests which a plaintiff may have, so as to be entitled to sue, see section 15. The suit can be filed in the principal court of original civil jurisdiction in the district. A preliminary application for leave to institute the suit should be made to the court before institution of the suit (section 18). As in the application the plaintiff has to show sufficient *prima facie* ground for the suit, all the allegations which are to be made in the suit should be made in the application. It may be more convenient to attach a copy of the proposed plaint to the application, in which case it will not be necessary to detail all the facts over again in the application. The application requires to be verified (*Amdoo* v. *Muhammad Davud*, 24 M 685). but it is not necessary that notice of it should be given to the other side (*ibid*) or an inquiry be held before leave is granted (*Syed Husain* v. *Syed Hamid*, 1930 ALJ 1208).

What amounts to a public temple as distinguished from a private temple. (*Bala Shankar Maha Shankar Bhattjee* v. *Charity Commissioner*, A 1995 SC 167; *Jammi Raja Rao* v. *Shri Anjaneyaswami Temple Valu*, A 1992 SC 1110, (1992) 3 SCC 14; *T.V. Mahalinga Iyer* v. *State of Madras*, A 1980 SC 2036). The most important tests are whether the members of the public are entitlled to worship in the temple as of right, if the expenses of the temple are met from the contributions made by the public; whether the managament as well as devotees have been treating that temple as public temple and that *sevas* and *utsavs* conducted in the temple are those usually conducted in public temple. (*Goswami Shri Mahalaxmi Vahuji* v. *Shah Ranchodas*, A 1970 SC 2025). In the case of a private temple the beneficiaries are specific individuals, but in the case of a public temple the beneficiaries are indeter-

(2) A decree of Rs.1,55,673, being the value of the said jewellery, misappropriated or disposed of by the defendant, as damages for the defendant's said act of conversion, against the defendant personally.

(3) Costs of this suit against the defendant personally.

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minate or fluctuating general public or class thereof (*Bala Shankar Mahashankar Bhattjee* v. *Charity Commr., Gujarat*, A 1995 SC 167).

In a suit under section 5 (3) of Charitable and Religious Trusts Act, the deity ought to be impleaded; otherwise it will not be bound by the decree even though members of the Hindu public may be bound (*Narayan Bhagwantrao* v. *Gopal*, A 1960 SC 100).

Chapter XIX

AFFIDAVITS

As an affidavit is an important document and the consequences of a false affidavit are serious,[1] and therefore, great care is required in drafting it.

As far as possible the affidavit should be filed by a party to the suit or application or by his authorised agent or in their absence by any other person having knowledge of the facts in question. In cases by or against the State or any other public body, an officer dealing with the matter or having access to the relevant records may do so.

A court may at any time for sufficient reason, order that any particular fact or facts may be proved by affidavit or that the affidavit of any witness may be read at the hearing on such conditions as the court thinks reasonable.[2] Final adjudication of rights of parties in a civil suit cannot be generally based on affidavits, but interlocutory matters, such as applications for temporary injunction, arrest or attachment before judgment, for appointment of a Receiver, or for adjournment, or for leave to amend pleadings, or for setting aside an order to proceed *ex parte*, or for seeking discovery or interrogatories, are normally decided on affidavits. So are writ petitions. Adjudication under Special Acts such as U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, is also generally based on affidavits. It is not open to the Court to order evidence on affidavits, if the parties bonafide want to lead oral evidence and the witnesses are available.[3]

Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except on interlocutory applications, on which, statements of his belief may be admitted, provided that the grounds thereof are stated.[4]

Affidavits sworn "to the best of my knowledge"[5] or only "on belief"[6] are useless. All affidavits must strictly conform to the provisions of O.19, R.3.

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1 Punishable under sections 199, 200, I.P.C.

2 O.19, R.1; *Kandesh Spinning Company* v. *Rashtriya Girni*, A 1980 SC 581

3 *Abbott Laboratories (India) Ltd.* v. *J.D. Jandar*, 1995 All. H.C. 3797 (Bom).

4 O. 19, R.3.

5 *Akshay Kumari* v. *Naini Ranjan*, A 1956 Cal 495.

6 *Nem Chandra* v. *State*, A 1953 All 99.

and in the verification it must be specified as to which portions are being sworn on the basis of personal knowledge and which on the basis of information received and believed to be true. In the latter case the source of information must also be disclosed.[7] Where the nature and source of information are not divulged, the affidavit is not in accordance with law.[8] The affidavit is inadmissible in evidence.[9] However, the deponent can be directed to file fresh affidavit disclosing source of information, as amendment in affidavit is not permissible.[10]

Affidavits not properly verified cannot be treated as evidence.[11] A defect in verification such as omission to specify the date and place of execution of affidavit is a mere irregularity and not fatal.[12] An affidavit prepared in English, signed in Hindi by the deponent, contents of which have not been explained to the deponent has no evidentiary value.[13] Where, however, a writ petition is based on an affidavit which has not been properly verified, it is not necessary to dismiss the petition on that ground without first giving the petitioner an opportunity to file a duly verified affidavit.[14]

The cost of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matters, or copies or extracts from documents shall (unless the court otherwise directs) be paid by the party filing the same.[15] Where the affidavit contains contradictory versions, the court may permit cross-examination of the deponent.[16]

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7 *State of Bombay* v. *Purushotam Jog*, A 1952 SC 317; *Barium Chemicals* v. *Company Law Board*, A 1967 SC 295; *Gouri Shanker Mukherjee* v. *State of West Bengal*, A 1977 Cal 125.

8 *Sukhwinder Pal Bipin Kumar* v. *State of Punjab*, A 1982 SC 65; *R. Murlidhar Reddy & Co.* v. *National Projects Construction Corpn. Ltd.*, A 1993 Delhi 68.

9 *Har Krishan Khosla* v. *Alembic Chemicals Works Co. Ltd.*, A 1986 All 87 (DB).

10 *Pannalal Ganguly* v. *State of Tripura*, A 1982 Gau 55 (*Dwaraka Nath* v. *I.T.O.*, A 1966 SC 81 relied on); *D.N. Gupta* v. *Jaswant Singh*, A 1982 Delhi 250.

11 *Ramubai* v. *Kia Ram*, A 1964 Bom 96; *Sham Sunder* v. *Bharat Oil Mills*, A 1964 Bom 38; *Bhupender Singh* v. *State of Haryana*, A 1968 Punj 406.

12 *Mehar Singh* v. *Mahendra Singh*, A 1987 Delhi 200.

13 *Abdul Rashid* v. *Calcutta Municipal Corporation*, A 1990 Cal 37.

14 *Dwarka Nath* v. *I.T.O.*, A 1966 SC 81, (1965) 3 SCR 536.

15 O. 19, R.3.

16 *Gulabchand Jain* v. *Khushal Chand*, A 1992 MP 264; *Chotu Khan* v. *Abdul Karim*, A 1991 Raj 119.

The name of the court should be written at the top of all affidavits. If the affidavit is in support of, or in opposition to, an application respecting any case pending or being instituted in the court, the cause title of such case should be written under the name of the court with the number of the case, if a number has been assigned. If there is no case, the affidavit shall be titled "*In the matter of the petition of*—". After that, the full name and address of the person making the affidavit should be given thus : "Affidavit of AB, son of etc." Then should follow the affidavit proper. Rules have been made by various High Courts which should be carefully studied and affidavits should be drafted so as to meet all the requirements of those rules. Subject to any statutory rules, the following rules of guidance should govern the drawing up of an affidavit :

(1) Not a single allegation more than is absolutely necessary should be inserted in an affidavit.

(2) The person making the affidavit should be fully described in the affidavit, and the fact that he is conversant with the facts of the case be recited. Also that the contents of the affidavit have been explained to him and he has understood the same.

(3) An affidavit should be divided into paragraphs, numbered consecutively, and, as far as possible, each paragraph should be confined to a distinct fact.

(4) Every person or place referred to in the affidavit should be correctly and fully described, so that he or it can be easily identified.

(5) The declarant should use the words "I solemnly affirm" or "I make oath and say", or that "The deponent solemnly affirm (or makes oath) and states as under."

(6) Affidavits should generally be confined to matters within the personal knowledge of the declarant. If he verifies a fact on information received, he should use the words "I am informed by so and so" before every such allegation or in the paragraph containing the verification. If the declarant believes the information to be true, he must add "and I verily believe it to be true".

(7) When the application or opposition thereto rests on facts disclosed in documents or copies, the declarant should state what is the

source from which they were produced, and his information and belief as to the truth of facts disclosed in such documents.

(8) The affidavit should have the following oath or affirmation written out at the end :

"I swear (*or*, solemnly affirm) that this my declaration is true (*or*, that the contents of this affidavit are true), that it conceals nothing, and that no part of it is false".

(9) If there are any alterations or interlineations in the affidavit, they must not only be initialled by the deponent but be authenticated by the officer before whom it is sworn. Rules have been made by High Courts for interpretations of affidavits to deponents, identification of deponents and swearing of affidavits.

(10) Amendment in an affidavit is not permitted, but a supplementary affidavit should be filed with the leave of the court when any mistake or error is intended to be corrected or any addition is intended to be made. The new affidavit need not be in entire supersession of the old one, and need not therefore repeat all the facts. It may be confined to the matter which is sought to be added or amended thus :

"I take oath and say that my statement in para 3 of the affidavit sworn by me, and filed on November, 5, 1995, to the effect that Lachman died on August 1, 1995, was based on wrong information and is not correct, and that the said Lachman really died on August 8, 1995."

PART II

PRECEDENTS

PLAINTS

The requirements of a plaint have already been laid down in Chapter XIII of Part I. It has also been shown in that chapter how the "heading and title" of a plaint should be drafted, what particulars the formal portion of the body of plaint should contain and in what form such particulars should be drawn up. These are the general requirements of all plaints and are more or less similar in all cases. But the other portions of the plaint, viz., the substantial portion of its body, and the relief claimed, are always different, both is substance as well as in form, in different kinds of suits. Therefore, in the precedents given below, models of only this portion of the plaint have been given, the formal portion and the heading and title having been omitted. In order, however, to show what a complete plaint should be, Precedent No.1 has been drafted as a full plaint, containing all the requirements of law. **The heading, title and the necessary formal portion of the body of the plaint should, therefore, be added to each precedent in order to make it a complete plaint.** As to the formal portion, it must be remembered that the date on which the cause of action arose, the facts showing that the court has jurisdiction, and the valuation of the suit for the purposes of court-fee and jurisdiction, are the essentials of every plaint. Other facts, e.g., those showing that the plaintiff sues in a representative character, or that the claim falls within any exception to the general law of limitation, are to be alleged only in cases in which they are necessary.

The precedents of plaints given in this book are classified into the following three groups according to the nature of the suits :

1. Suits arising out of Contract.
2. Suits based on Tort.
3. Other suits, e.g., those based on personal law, or on any provision of an Act of the Legislature.

I. PLAINTS IN SUITS ARISING OUT OF CONTRACT

ACCOUNT *(a)*

No. 1—Suit Against an Agent for Account

In the Court of the Civil Judge (Junior Division) at Agra

Original Suit No. of 1995.

Alfred Addison, son of the late George Addison, resident of Etmadpur, district Agra ... ...Plaintiff

versus

Muhammad Hussain, son of Ahmed Baksh Sheikh, aged 45, occupation service, Muhalla Nai ki Mandi, Agra ... ...Defendant

The above-named plaintiff states as follows :

1. By a registered general power-of-attorney, dated June 20, 1990, the late George Addison appointed the defendant as his agent to collect the rents from tenants of his houses and shops in the city of Ferozabad.

2. The defendant began collection from July 1990 and has been collecting rents from the said tenants ever since.

(a) The word 'account' has no definite legal meaning. The primary idea of 'account computation' is some matter of debit and credit and it implies that one is responsible to another on the score either of contract or some fiduciary relation of a public or private nature created by law or otherwise.

The following facts must exist to impose an obligation to account: (1) The person upon whom such obligation is sought to be imposed (the obligor) must have received some property not his own. (2) The person seeking to impose the obligation (the obligee) must be the owner of the property in respect of which the obligation is sought to be imposed. (3) The obligor must not have received the property as mere bailee. (4) The obligor must have received it into his possession and control. (5) There must be a fiduciary relation between the obligee and the obligor or there must be privity between them by contract or otherwise (*Ashutosh Roy* v. *Arun Shankar Das*, A 1953 Cal 244; *State of Bihar* v. *R.B. Das Jalan*, A 1960 Pat 400).

3. The said George Addison died intestate, and the plaintiff is his son and has obtained letters of administration to his estate.

4. The particulars and details of the collections made by the defendant are not known to the plaintiff, and the defendant has not rendered any account of the money received by him for the said George Addison, either to the said George Addison or to the plaintiff, though the plaintiff requested him to do so.

5. The cause of action for the suit arose on June 28, 1992, when the plaintiff's demand for an account was made and refused.

6. The defendant is a resident of Agra within the jurisdiction of this court.

7. The value of the subject-matter of the suit for the purposes of court-fee and jurisdiction is fixed tentatively at Rs.11,000.

8. The time for filing the suit expired on June 28, 1995, but the court was closed on that date and remained closed for the annual vacation until July 6, 1995.

A suit for account is an extraordinary remedy and becomes necessary when the plaintiff does not know the particulars sufficiently enough to enable him to sue for recovery of the specific sum due to him from the defendant. If, however, he knows such particulars of the amount which is due to him, he should bring a suit for recovery of that amount (*Khem Chand* v. *Tarachand*, 161 IC 505; A 1936 Sind 9). The test is whether having regard to the terms of the agreement between the parties and the nature of the work done, it was possible for the plaintiff to bring a suit for a definite amount or for an amount which was ascertainable, or on the other hand, a total sum could only be determined after the accounts in the possession of the defendant had been examined (*Anant Ram Munshi Ram* v. *Speddinga Singh & Co.*, A 1960 Punj 415; *State of Bihar* v. *Ram Ballabh Das Jalan*, A 1960 Pat 400). If the plaintiff knows the particulars of some transactions, but not of others, he can claim a definite sum on account of the former (giving the particulars which he knows), and can call for an account of the latter. But it is not from everybody that an account can be called for. It can be called for from an agent, or a mortgagee in possession, or a trustee managing the trust property, or a guardian or a managing partner, or a co-sharer in possession of joint property, or a receiver, or from anyone else in a similar position who has received money on plaintiff's behalf. It cannot be demanded from a sub-agent (*Banwari* v. *Pramatha*, ILR (1937) 2 Cal 124).

When defendant co-sharer, in possession of property, was managing it and deriving all profits, suits for accounts against him by other co-sharer was held maintainable (*Shekar Hussain* v. *Shariful Hussain*, 1979 ALJ 1180). A coparcener in

The plaintiff claims:

(1) A full and true account of the money realised by the defendant as agent of the late George Addison; and

(2) Payment of Rs.11,000 or such sum as may be found due from him on the taking of such account.

(3) Interest

(Sd.) ALFRED ADDISON

I, Alfred Addison, declare that the contents of paragraphs 1 and 3 of the above plaint are true within my personal knowledge, and that the

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Mitakshara family cannot sue the manager of a joint Hindu family for account, unless he establishes fraud, misappropriation or improper conversion or mistake serious enough for reopening the accounts (*Hiralal* v. *Pyarelal*, 184 IC 833 A 1939 All 681; *Jyote Bhushan Gupta* v. *Gokul Chandra*, 1959 ALJ 110; *K. Akhalrai Sinha* v. *K. Mahadevalla*, A 1967 AP 247), but in Dayabhaga family a *Karta* can be sued for account (*Benoy Krishna* v. *Amarendra*, A 1940 Cal 51, 186 IC 546). As there is no statutory liability on a principal to keep accounts for the agent, the latter cannot ordinarily sue the former for account (*Narmada Charan* v. *Maharaj Bahadur Singh*, 169 IC 930, A 1937 Cal 359; *Mirza Najm Affendi* v. *Kashmir Footwears*, A 1946 All 489), but if, under an express contract or trade usage, it becomes the duty of the principal to keep accounts, the agents can sue him (*Gopi Kishan* v. *Padam Raj*, 37 IC 510; *Lakshimi Sugar Mills* v. *Banwari Lal*, A 1959 All 546), e.g., when the plaintiff is an insurance company agent who is paid commission on the premia paid on all policies effected through him (*Ramlal* v. *Asian Commercial Assurance Co.*, 144 IC 505, A 1933 Lah 483; *Gulab Rai* v. *Indian Equitable Insurance Co.*, 167 IC 929, A 1939 Sind 51). The agent may have an equitable right to sue the principal for account in special circumstances, e.g., where accounts are in possession of the principal or where agent's commission cannot be determined without seeing principal's account (*Narain Das* v. *SPAM Pehanund*, A 1967 SC 333; Also see, *Ramkrishna Agencies* v. *L.I.C.*, A 1967 AP 109; *Hindustan Handloom Factory* v. *Firm Rameshwar Dayal Sadhu Ram*, 1974 Cur LJ 577). But if it is found that the agent had accounts which he withholds or that the agent has no account because of his own failure to keep them due to his own fault, court may refuse to grant him the relief (*Gulabrai* v. *Indian Equitable Insurance Co.*, A 1939 Sind 51).

A creditor cannot sue his debtor for an account of payments made by the latter and of the balance due to the former, as a debtor is not liable to render such account which the creditor ought to know himself. A trustee cannot call upon his co-trustee to render account, though he can have inspection of all the papers and books of account (*Jamna Das* v. *Damodar Das*, 103 IC 225, A 1927 Bom 424, 29 BLR 418); such suit is, however, maintainable where the co-trustee was guilty of breach of trust (*Maharaj Bahadur* v. *Tej Bahadur*, A 1940 Cal 416, 190 IC 144). A person in

contents of para 2 and of so much of para. 4 as refer to the defendant not having rendered account to George Addison are believed by me, on information received, to be correct, and that the contents of so much of paragraphs 5, 6 and 8 as refer to accrual of cause of action, jurisdiction of this court and limitation respectively are based on legal advice received by me and believed to be correct while the rest of the contents of those paragraphs are true within my personal knowledge. The contents of the rest of para 4 are true within my personal knowledge. Verified at Agra, this, the 6th day of July, 1995.

(Sd.) ALFRED ADDISON

(Sd.) JWALA PRASAD, ADVOCATE

No. 2—Suit for Account Against a Commission Agent.

1. On June 1, 1993, the plaintiff, by a verbal agreement, appointed the defendant as his commission agent for the sale of grain. The defendant agreed that he would sell the grain sent by the plaintiff to the defendant's shop and would, on request, render to the plaintiff a true and full account

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management of the private trust is bound to render proper account (*T.G. Vishwanathan Chettiar* v. *T.A. Shanmugha Chettiar*, A 1992 Mad 148 DB). A client can sue his counsel (*Ramlal* v. *Langhran*, 140 IC 564, A 1933 Lah 60). An assignee of a definite sum of money cannot sue for accounts, he can only bring a suit for the recovery of the specified sum thus assigned (*Jaini Bros & Co.* v. *Shankar Lal*, A 1938 Lah 270, 178 IC 176).

In a suit for account, the whole account between the parties should be claimed, and the plaintiff is not at liberty to select capriciously a single transaction (*Godhan Ram* v. *Iaharmall*, 40 C 335, 17 CWN 67, 17 CLJ 636, 16 IC 583; *Lachmi Chand* v. *Jagoo Lal*, 166 IC 953, A 1937 Pat 55). An agent cannot be sued for one item as a debt without settlement of accounts (*Narayan Chettai* v. *Aruna Chela Pillai*, (1965) 2 MLJ 207).

It is essential to allege in the plaint full facts showing how the defendant is liable to render account to the plaintiff, e.g., in a suit against an agent, that he received money for the plaintiff or any part of it. The terms on which one party was employed by the other and any other facts showing that the defendant is an "accounting party" must be alleged (*Shiva Prasad* v. *Hanuman*, A 1938 Pat 392, 177 IC 133; *Kanhaiyalal* v. *Hiralal*, A 1947 Bom 255, 48 BLR 795). Unless a time is fixed by contract for the rendition of account, the accounting party is liable to render account only when called upon to do so. **Hence it is necessary to allege that account was demanded and refused; or that the account given was not true and full, and also that the plaintiff was kept in ignorance as to the exact amount due to him.**

of all sales so effected, and would pay over to the plaintiff all moneys received by him for such grain.

2. The defendant has, as such agent, effected sales of the grain sent to him by the plaintiff from time to time, and has paid to the plaintiff Rs.2,000 on August 3, 1993, and Rs.3,000 on September 20, 1993.

3. The defendant has not, though requested by the plaintiff to do so, rendered any account to the plaintiff or paid over to the plaintiff all the money received by him for the grain. The said request was made by a registered notice served on the defendant on May 20, 1994.

4. The plaintiff has, in consequence, been unable to discover the names of the purchasers and has been left in ignorance as to how much money has been received by the defendant from the purchasers and how much is still outstanding.

The plaintiff claims :

To a suit for account should be added a prayer for the payment of the money due to the plaintiff, unless the plaintiff is not immediately entitled to the amount but is only entitled to examine the accounts, as a beneficiary under section 19 (b) Indian Trust Act. To a suit for account against an agent for collection of rents may be added a prayer for recovery of rents remaining unrealised owing to agent's negligence (*Hari* v. *Ramjatan*, 180 IC 64, A 1939 Pat 17). When payment of money is claimed, O.7, R.7, requires the amount sued for to be approximately mentioned in the plaint. If an Agent is bound to render accounts to several persons jointly all such persons must join as plaintiffs as he cannot be called upon to render account separately to each (*Kadir Buksha* v. *Rajchernessa*, 62 IC 766 Cal.).

Account can be demanded from an agent, but not from his heirs (*Brij Mohan* v. *Abani*, 42 CWN 1157, A 1938 Cal 610, 177 IC 935; *Badri Nath* v. *Kesho Kumar*, A 1940 Pat 114). If the agent has died without rendering an account, the plaintiff can sue his heirs only for recovery of the specific amount which he can prove was due from him, or for loss suffered by the negligence or misconduct of the agent (*Kumeda* v. *Ashutosh*, 17 CWN 5, 16 IC 742; *Prem Das* v. *Charan Das*, 117 IC 233, A 1929 Lah 362, 11 Lah LJ 66 DB). If an agent dies during the pendency of a suit, the suit can be continued against his heirs but plaintiff can get only the specific amounts which he proves to be due from the deceased (*Sasi Sakhareswar Roy* v. *Hajiramesa*, 47 IC 371). The heir will, however, be liable only to the extent of the property which has come into his hands from the agent. But the heirs of a guardian can be called upon to render account just as the guardian could be (*see* Sec. 36 Guardian and Wards Act). The heirs of a trustee cannot be called upon to render account but a suit against them will be for recovery of trust fund and therefore, if in such a suit a

(1) To have a full and true account of such sales.

(2) Payment of the moneys received, minus the sum of Rs.5000 already paid.

(3) Interest on such moneys, by way of damages, at 12 per cent per annum or at such rate as the court considers equitable up to the date of suit.

(4) Interest from the date of suit to the date of payment at such rate as the court deems reasonable.

No. 3—Suit by an Insurance Agent Against a Company

1. By an agreement in writing dated 31st March, 1988, made at Bombay, the defendant company appointed the plaintiff as their insurance agent for Uttar Pradesh, and agreed to pay the plaintiff a commission of

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sum is on taking accounts found due to the heirs, decree cannot be passed in that suit in favour of the heirs (*Srish Chand* v. *Supravat*, A 1940 Cal 337, 190 IC 295). In the case of a joint family dealing with a third person, the manager alone can sue, and a minor co-parcener cannot, even though he impleads the manager as a defendant, as the manager alone can give a valid discharge (*Khemchand* v. *Mathradas*, A 1939 Sind 289). In the case of a partnership at will, a partner cannot sue for account except for general accounts and dissolution of the partnership (*Kessamal* v. *Gopi*, 9 A 120; *K.V. Shanthana Krishna* v. *K.S. Chellappa*, 101 IC 390, 25 LW 506), but the court can, in a proper case, decree a partial settlement of account (*Firm of Harijimal Mela Ram* v. *Kriparam*, 2 Lah 351), e.g., where the matter in dispute does not involve the taking of general accounts. The position of a *pucca arhatiya* so far as rendition of account is concerned, is that of an agent and he is also liable to render accounts of the transactions entered into by him on behalf of his constituents as an agent (*Ram Bhajan* v. *Gaya Prasad*, 1962 ALJ 20; *Ram Deo Jai Deo* v. *Seth Kaku*, A 1950 EP 92).

If account has once been rendered or settled, no fresh suit for account is maintainable, but the suit must be one for recovery of the balance due. The mere production of account or delivery of a set of written accounts without explaining them and without producing vouchers to support them is not rendering an account (*Annoda* v. *Dwarka*, 6 C 754; *Madhusudan* v. *Rakhal*, 43 C 248; *State of Rajasthan* v. *Rao Manohar Singh*, A 1961 Raj 143; *Bharat* v. *Kiran*, 52 C 766, A 1925 Cal 1069 DB; see however, *N.S.K.L. Kulandayan Chettiar* v. *A.R.R.M. Omayal Achi*, (1961) 2 MLJ 282; *Shiva Prasad* v. *Hanuman*, A 1938 Pat 392, 177 IC 133). Even the principal's writing "Seen" on the account book does not mean that the account has been rendered (*Shanker Lal* v. *Toshanpal*, 150 IC 151, 1934 ALJ 453, A 1934 All 553). But if all the papers are submitted, the plaintiff should call upon the agent to explain the accounts, and it will be only on the latter's refusal or neglect to do so

10 per cent on all the premia to be paid on the policies to be effected through, or on introduction by, the plaintiff.

2. The plaintiff acted in pursuance of the said agreement and between the 1st April, 1988 and the 31st December 1988, effected and also introduced the following policies of the defendant company:—

(1)

(2)

(3) etc., etc.

3. The defendant company have paid to the plaintiff during this period only a sum of Rs.2,000 on account of commission and not rendered an account of the premia on the policies referred to in para 2, although the plaintiff, demanded the account by his registered letter dated the 20th April 1989.

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that he can bring a suit. **He must, therefore, allege in the plaint such demand and refusal** (*Bharat* v. *Kiran*, A 1925 Cal 1069 DB). If an account has been rendered and not disputed, the plaintiff must either accept the account or allege some fact which justifies the court in treating the account as imperfect so that a correct account has not been rendered and the defendant is not absolved from his liability (*Radhika Prasad* v. *Nand Kumar*, A 1944 Nag 7). It is not open to a principal who has got all the accounts of his agent in his possession to employ the machinery of the court for examining the accounts on the off chance of making the agent liable for any sum which, on examination may be found due (*Nalini Kumar* v. *Gadadhar*, A 1929 Cal 418, 49 CLJ 245 DB). Even a settled account can, however, be reopened if fraud or substantial error is shown, particulars of which should, of course, be given (*Bhagwan* v. *Damodarji*, 42 A 230, 18 ALJ 100, 59 IC 20; *Bharat* v. *Kiran*, A 1925 Cal 1069 DB; *Krishna Bhatta* v. *Ishwara Bhatta*, 169 IC 860, A 1937 Mad 579), but a mere allegation of undue influence and coercion by the plaintiff is not sufficient to repudiate the settlement and reopen the accounts (*Pethaperumal Chettiar* v. *Rama Swami Chettiar*, 1938 MWN 895, (1938) 2 MLJ 505, A 1938 Mad 919). Even a single fraudulent entry is sufficient to have the account reopened (*Puran Mal* v. *Ford*, 17 ALJ 805). If, however, the account-books and papers are with the plaintiff himself, he is not entitled to sue for accounts without producing the books and papers (*Debendra* v. *Narendra*, 30 CLJ 417, 54 IC 636, 24 CWN 110; *Mohanlal* v. *N.W. Rly.*, 5 Lah LJ 19). In such cases the plaintiff should point out the entries in the accounts which he alleges to be erroneous; or state what monies have been received and not credited. Specific, direct and distinct averments of this are necessary in the plaint (*Anantha* v. *Subha Rao*, 13 Mys LJ 200). When plaintiff claims a specific amount on the basis of settled accounts, and the court finds that there was no settlement of accounts, the court cannot pass a decree for the sum the court considered due after going into accounts. In such a situation the court should either dismiss the suit or

4. The plaintiff does not know which of the policies have lapsed, matured or been forfeited and therefore is ignorant as to how much money is due to him as commission under the aforesaid agreement.

The plaintiff claims :

(1) To have a full and true account of the moneys realised by the defendant company on account of premia on the above-mentioned policies and of the commission due to the plaintiff.

(2) Payment of the sum found to be due to the plaintiff on taking of account after deduction of Rs.2,000 already received.

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should pass a preliminary decree for accounts directing that books of accounts be examined item by item and an opportunity afforded to the plaintiff to impeach and falsify either wholly or partly the accounts on the ground of fraud, mistakes, inaccuracies or omission (*Loonkaran Sethia* v. *Ivan E. John*, A 1977 SC 336).

Valuation : Subject to local rules framed by the High Court under Sec. 9 of the Suits Valuation Act, 1887, or the local amendments, if any, to that Act, a plaintiff is entitled to put his own valuation on a plaint and to pay court-fee on that valuation. But the valuation should not be arbitrary and the plaintiff should do his best to give a fair estimate of the relief which he hopes to obtain (*Mani Devi* v. *Anpurna*, A 1943 Pat 218, 206 IC 126; *Sumitra Devi* v. *Jahnvi Prasad Sah*, A 1995 Pat 202 (DB); *Meenakshi Sundaram* v. *Venkatachalam*, (1980) 1 SCC 616; *Sujir Keshav Nayak* v. *Sujir Ganesh Nayak*, A 1992 SC 1526). If more money is found due, a decree will be passed for it on additional court-fee being paid on demand (*Gulab Khan* v. *Abdul Wahab*, 31 C 365; *Balwantrao* v. *Bhima*, 13 B 517), even if the amount exceeds the court's pecuniary jurisdiction (*Chidambaran Chettiar* v. *Muthia Chettiar*, A 1937 Rang 320, 170 IC 39; *Benudhar Jena* v. *Prabir Chandra*, A 1985 Ori 117). The *forum* of appeal from a decree in suit for account is governed, according to Allahabad, Patna and Madras High Courts, by the valuation originally put by the plaintiff (*Putta* v. *Rudrabhatea*, 39 IC 439; *Muhammad Abdul Majid* v. *Ala Bux*, 47 A 534, 23 ALJ 216, A 1925 All 376 DB, 86 IC 1055; *Sumitra Devi* v. *Jahnvi Prasad Sah*, A 1995 Pat 202 DB), but according to Punjab, Bombay and Calcutta High Courts, by the amount decreed by the lower court (*Budha* v. *Rallia*, 9 L 23, A 1928 Lah 157 DB, 110 IC 631; *Ibrahimji* v. *Bejanji*, 20 B 265; *Ijjatulla* v. *Chandra*, 34 C 954, 11 CWN 1133 FB).

Jurisdiction : Suit can be filed where account is agreed to be rendered, or where contract of agency is made or performed or where refusal to give account takes place (*Gobardhandas* v. *Dawlat Ram*, 94 IC 287 Sind). A suit against an agent should generally be filed where the agent works as such and not where the principal resides or works (*Audinarayana* v. *Lakshmi Naraina*, A 1940 Mad 588; *Tika* v. *Dowlat*, 22 ALJ 591).

Procedure : In such suits, a preliminary decree directing accounts to be taken on such terms as the court thinks proper shall be passed (O.20, R.16), though

No. 4—Suit for Account Against a Co-Sharer

1. One Basdeo, an uncle of the parties, was owner of the six shops described at the foot of the plaint.

2. The said Basdeo executed a deed of gift in respect of the said shops on September 20, 1986, in favour of the plaintiff and the defendant,

omission to pass a preliminary decree does not make the final decree illegal if the parties have not been prejudiced (*Pandurang* v. *Gunwantrao*, 109 IC 385, A 1928 Nag 299). After the defendant has filed the account as directed, the plaintiff is entitled to take objections and a final decree is passed after adjudication of those objections. If the facts are so simple that a final decision can readily be given and the passing of a preliminary decree means an unnecessary lengthening of proceedings, a final decree may be passed at once (*Nallaperumal* v. *Vallayappa*, 53 M 475). Where, however, an account of a mortgagee's receipts and profits has to be taken before determining the amount payable by a mortgagor on redemption, the only preliminary decree will be that under O.34, R.7, and no separate preliminary decree under O.20, R.16 should be passed (*Naunihal* v. *Alice Georgina Skinner*, A 1925 All 707 DB). The fact that defendant has suppressed the accounts is no ground for passing a final decree straightway (*Palaniappa* v. *Ramanathan*, 1939 MWN 360, 49 LW 608). It is unnecessary to pray in the plaint for the appointment of a commissioner to take accounts. The court can be moved for this, if necessary, at the proper stage. If the defendant does not render account as directed by the preliminary decree, the plaintiff may prove in any way what amount is due to him (*Ramjilal* v. *Bujan*, 28 PLR 98, 9 Lah LJ 94, 109 IC 820, A 1927 Lah 782 DB). But when a commissioner has been appointed and the defendant failed to produce account before him, he was not permitted by court to adduce evidence thereafter (*Ram Singh* v. *Somendra Kumar*, A 1973 Raj 37). If on taking accounts a sum is found due to the defendant, a decree for that amount can be passed in favour of the defendant on his paying the necessary court-fee (*Parmanand* v. *Jagat Narain*, 32 A 525, 6 IC 162; contra, *Najan* v. *Salemahomed*, 24 BLR 998, 77 IC 943; *Panuganti* v. *Zaminder of Tarwur*, 42 M 873, 53 IC 234; *Bhawani* v. *Chhajju*, 168 IC 983, A 1937 All 276, 1937 AWR 16; *Firm Kalu Singh* v. *Baldeo Singh*, A 1942 Lah 81).

A suit against an ex-guardian can be filed after the ward attained majority as well as during his minority. In the latter case, the permission of the District Judge should first be obtained under section 36 Guardians and Wards Act, by any person who wishes to bring the suit as the minor's next friend. But the permission, being only a condition precedent, need not be pleaded in the plaint. The mere filing of an account under section 34(c) by the guardian does not relieve him nor can the scrutiny of the account by the Judge (*Sita Ram* v. *Gobindi*, 22 ALJ 585, 80 IC 592, 46 A 458), but an order of discharge under section 41(4) bars a suit for account. If, however, an account has been filed by the guardian and it is alleged to be wrong in certain particulars, the suit will properly be not one for account but for recovery of the money due according to what plaintiff thinks should be the correct account.

giving to each a half share in all and every one of the said six shops.

3. The said shops are all in possession of tenants, and the defendant has been collecting the rents with the consent of the plaintiff.

4. The plaintiff requested the defendant to render to him an account of all the moneys realised by him as rent from September 20, 1986, but the defendant has not rendered any account of collection of rent, or paid to the plaintiff his half share, or any portion, of the money so realised.

5. The plaintiff is not aware of the exact amount realised by the defendant from the tenants.

Limitation : For such suit against an agent is 3 years from the date the account was demanded and refused, or where no such demand was made during the agency, when the agency terminated (Article 88 and 89 of Limitation Act, 1908; now Article 3 of the Act of 1963). A demand after termination of agency does not give a fresh start for Limitation (*Hingulal* v. *Sarju Prasad*, 169 IC 135, A 1937 All 363). Article 89 of Limitation Act, 1908 was applied even to a suit by a principal's son after principal's death (*Bir Bikram* v. *Jadav Chandra*, 40 CWN 245). An agency is deemed to terminate when a business of agency is completed though liability to render account may continue (*Gordhandas* v. *Gokul Khataoo*, 96 IC 79, A 1926 Sindh 264; see however, *Babu Ram* v. *Ram Dayal*, 12 A 541; *Fink* v. *Baldeo Das*, 26 C 715); neglect to comply with a demand may amount to refusal (*Pran Ram* v. *Jagdish*, 49 C 250), but there must be a definite repudiation on the part of the defendant of a liability to account or any circumstances from which the failure or omission to render account might be construed as a refusal (*Abdul Latif* v. *Gopeswar*, 56 CLJ 172). When the agent promises to submit the account, his conduct cannot amount to refusal. If a particular date is fixed for settlement of accounts, the agency should be deemed to continue upto that date and limitation will begin to run from that date (*Lakhmi Chand* v. *Firm Chajjumal*, 91 IC 487, A 1926 Lah 200). When the agency is revoked by a letter, the cause of action cannot arise until the letter reaches the agent (*Ramchander* v. *Rure Kunwar*, A 1939 All 739, 1939 ALJ 961, 1939 AWR (HC) 735). There is no limitation for a suit against a trustee (section 10, Limitation Act, 1963), but if there is no express trust section 10 will not apply and Article 120 of Limitation Act, 1908 (corresponding to Article 113 Limitation Act, 1963) was applied in such a case (*Annamalai* v. *Matdukaruppan*, A 1931 PC 9, 130 IC 609, 60 MLJ 1, 35 CWN 145; *Pappa* v. *Shanmughathammal*, A 1991 Mad 90 DB). A suit between one co-owner and another was held to be governed by Article 120 and not by Article 62 of Limitation Act, 1908 (*Abu Shahib* v. *Abdul Haque*, A 1940 Cal 363, 189 IC 642). Suit by ex-minor against guardian was held to be governed by Article 120 and not by Article 62 of Limitation Act 1908 (*Mani Devi* v. *Anpurna*, A 1943 Pat 218, 206 IC 226). Now Articles 24 and 113 of the Act 1963 have replaced Articles 62 and 120 of the old Act respectively.

The plaintiff claims :

(1) To have a full and true account of all the moneys realised by the defendant from tenants of the aforesaid six shops.

(2) Payment of a half share out of the moneys realised by the defendant.

(3) Interest at 12 per cent per annum or at any other equitable rate, from the date of demand to the date of suit..

(4) Interest on the money found due to the plaintiff by way of damages from the date of suit to date of payment at such rate as the court deems reasonable.

No. 5—Suit for Account Against an ex-Guardian

1. The plaintiff was, uptill August 4, 1994, minor, and the defendant, by an order of the District Judge of Meerut, dated June 20, 1989, was appointed guardian of the property of the plaintiff.

2. The defendant was, on the application of the plaintiff's mother, removed from guardianship by the said District Judge, by an order dated September 21, 1993.

3. During the period of his guardianship, the defendant remained in possession of the plaintiff's property and realised the income thereof, but did not render any account of his income though requested by the plaintiff to do so, nor has he paid to the plaintiff any sum out of that due to him on

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Defence : The defendant may plead that he kept no accounts but the plaintiff himself used to do so and the defendant always gave every sum that he received for the plaintiff immediately to the plaintiff. He may plead that all the account books, papers and vouchers are with the plaintiff, hence he cannot render any account. He may plead that account was never demanded by the plaintiff, or that it had been settled. Settlement of account need not be in writing, the account need not be compared and expressly admitted as correct, but it can be inferred from conduct, e.g., keeping the account for a long time without objection (*Maneklal* v. *Jawaladutt*, A 1947 Bom 135, 28 BLR 727, 220 IC 461). He may plead that the transaction of which account is demanded forms part of numerous transactions or that the period selected by the plaintiff is not the whole period for which account should have been asked for. If he is an ex-guardian, he may plead discharge by the court under section 41 (4), Guardians and Wards Act. An agent cannot plead that another person had been appointed by the principal to supervise his work if it can be *prima facie* shown that he has made realisation (*Deb Prasanna* v. *Lakhi Narain*, 196 IC 641 Pat).

account of net profit for the said period. This request was made by the plaintiff verbally on March 20, 1995.

4. The plaintiff is not aware of the income which the defendant realised or of the expenditure he made on the plaintiff's behalf.

The plaintiff claims:

(1) To have a full and correct account of the income and expenditure realised and incurred by the defendant in respect of the plaintiff's property during the period of the defendant's guardianship.

(2) Payment of the balance due to the plaintiff.

(3) Interest from date of suit to that of payment at such rate as the court deems reasonable.

ACCOUNT, SUIT ON *(b)*

No. 6—Suit on Mutual, Open and Current Account

1. The plaintiff firm carries on business as sugar merchants at Delhi and the defendant firm carries on business as *grain dealers* at Rohtak.

2. In the month of *Baisakh*, 2039 *Vikram Sambat* (corresponding to April, 1982), it was verbally agreed between Ram Lal, Manager of the plaintiff firm and Sada Sukh, Manager of the defendant firm, at the plaintiff's

(b) An account between two parties may be either one sided or mutual. It is one sided when the obligations are all on one side and the payments are only in discharge of these obligations and do not create independent obligations, e.g., an account between a creditor and debtor or between a supplier of articles on credit and his customer, or between a banker and his customer (*Puttulal* v. *Jagannath*, 1935 ALJ 33, A 1935 All 53; *Bejoy Kumar* v. *Satischander*, A 1936 Cal 382; *Roshan Lal Kuthiala* v. *Raja Rana Yogendra Chandra*, A 1996 HP 14 DB). It is mutual when there are mutual or reciprocal dealings between two parties, and each party is under liability to the other, i.e. the transactions on each side create independent obligations on the other and the balance usually shifts from one party to the other (*Chittar Mal* v. *Behari Lal*, 6 ALJ 921; *Premji Virji* v. *Sasoon*, 102 IC 225, 29 Bom 375, A 1927 Bom 225; *Ramaswamy* v. *M.S.M. Chettyar*, A 1936 Rang 495; *Firm Mansa Ram* v. *Hari Lal*, A 1940 All 209). But it is not necessary that the balance should always shift from one side to the other and shifting of balance is not a necessary criterion of a mutual account. But the balance should be *capable of* such shifting (*Karsondas* v. *Surijbhan*, 145 IC 630, 35 BLR 929, A 1933 Bom 450). The fact that once or twice there were over-payments which were afterwards adjusted does not make the account mutual (*Gokuldas* v. *Radha Kishan*, A 1933 Nag 50, 142 IC

shop at Delhi that the plaintiff firm should supply to the defendant firm as much sugar as the latter would order in writing and the defendant firm should supply as much grain to the plaintiff firm as the plaintiff firm would order in writing, and that from time to time account would be made of the price and cost of grain and sugar supplied to the plaintiff firm and the defendant firm respectively, and the balance due from one party to the other would be paid in cash at Delhi.

It was also a term of the aforesaid agreement that interest would be calculated on each item at ten per cent per annum.

3. The dealings between the parties on the aforesaid agreement commenced from *Jeth Badi* 2039 and continued up to *Aghan Sudi* 15, 2044 and during this period Rs. 68,960 became due to the plaintiff firm from the defendant firm and Rs. 62,960 became due to the defendant firm from the plaintiff firm, thus leaving a balance of Rs. 6,230 against the defendant firm. Full particulars of the items on each side of the account are given in the list appended to the plaint, which the plaintiff prays may be treated as part hereof.

4. The aforesaid mutual account of the parties has been kept according to *Sambat* year, and the last item in the said account is of *Aghan Sudi* 15, 2044 *Sambat*.

123; *Basant Kumar* v. *Chota Nagpur Banking Association*, A 1948 Pat 18). There should be independent transactions between the parties and accounts should consist of reciprocity of dealings and not of items on one side only though made up of debits and credits. In one set one of the parties should hold the position of creditor and the other of debtor, and in the other, the position should be reversed (*Dau Dayal* v. *Pearelal*, 50 A 615, 108 IC 694, 26 ALJ 353).

If the mutual account is open and current, i.e., has not been settled and is running, a suit for balance due on it can be brought within three years from the close of the year in which the last item admitted or proved is entered in the account, such year to be computed as in the account (Article 85 of Limitation Act, 1908, and Article 1 of Act of 1963). There is a great advantage which such an account has over an account which is not mutual, open and current, as, in the latter case, the statute runs against each items from its date and a suit cannot be brought in respect of any item after the lapse of three years, while in the case of mutual account, even if all the items are more than three years old, the suit would be within time if filed within the time allowed by Article 1. The last item should, however, be real and not bogus, and if a defendant challenges that the last item set up as saving limitation is not real or is not made with his consent or knowledge, the plaintiff will have to

The plaintiff claims:

(1) Rs.6,230 principal and Rs.___ interest and

(2) Interest from date of suit at___ per cent per annum.

No. 7—Suit on Account which is not Mutual, and Alternatively on Balance Struck

1. The plaintiff carries on a shop for the sale of grain, cloth and other commodities of household use in village Ramnagar.

2. On June 1, 1982, it was verbally agreed between the parties that the plaintiff would supply on credit grain, cloth and such other articles, from time to time, to the defendant as the latter would require and that the defendant would pay the price of articles purchased, when demanded with interest at 2 per cent per mensem.

3. Between June 1, 1982 and April 20, 1984, the defendant made various purchases from the plaintiff and made several payments on account. Particulars of such purchases and payments are given at the foot of the plaint.

4. On April 20, 1984, an account was made and a balance of Rs.1,024 was found due from the defendant. The defendant admitted the correctness of the balance which was recorded on page 6 of the plaintiff's *khata bahi* and signed by the defendant. The defendant at that time agreed

prove it (*Firm of Fillip and Co.* v. *Mahommed Ali*, 55 IC 822 Sind). Account granting cash credit facility in the bank is a mutual, open and current account, Article 1 of the Limitation Act applies (*Om Prakash Agarwala* v. *State Bank of India*, A 1991 Ori 98; *State Bank of India* v. *Kashmir Art Printing Press*. A 1981 P&H 188). If the mutual account is closed and is not open, Article 1, will not apply. But an account is not necessarily closed whenever a balance is struck (*Jwaladas* v. *Hukum Chand*, 66 IC 387 Lah), unless the account is finally closed. If, inspite of the balance mutual transactions take place after that and are entered under the balance, the account is open (*Abdul Haq* v. *The Firm*, etc., 71 IC 259 Lah). Ordinarily balance is struck at the close of a year and the balance is carried forward to the account of the next year. The first year's account cannot in such cases be said to be closed. But where the balance was not so carried, and new items were entered in a subsequent account and the balance of the previous account was afterwards added to the balance of the new account, it was held that the whole did not become one account (*Firm Bhagwandas Kanhayalal* v. *Firm Nand Singh*, 100 IC 815, 28 PLR 146). An account was opened in a bank. For some time it was alternately in credit or overdrawn; from December 1928 it was always overdrawn up to June 1929. The Bank took a pronote

to repay the balance with interest at one per cent per mensem within two months. This agreement was made by the defendant in writing endorsed under the balance on the same page 6 of the plaintiff's said *khata bahi*.

5. The defendant has not made any payment since April 20, 1984.

6. The defendant has not paid the amount, or any part thereof, and the plaintiff claims it as balance due on the original account, or, in the alternative, on the basis of the new agreement of April 20, 1984.

The plaintiff claims:

(1) Judgement for Rs.1,024, on account of principal and Rs.125 on account of interest from April 20, 1984 to the date of suit; and

(2) Interest from the date of suit to that of payment at such rate as the court deems reasonable.

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as security for overdrawals and then the customer went on making payments towards the amount overdrawn. It was held that from June 1929 the character of the account was changed and it no longer remained a mutual account (*Bengal Burma Trading Co.* v. *Burma Loan Bank Ltd.*, A 1937 Rang 340). The same view has been taken in *Basant Kumar* v. *Chota Nagpur Banking Association*, A 1948 Pat 18, where it was held that each overdraft should be regarded as a separate transaction to which Article 57 of Limitation Act, 1908 (corresponding to Article 19 of Limitation Act 1963) should apply.

In a suit on a mutual, open and current account the plaint **must show the nature of the account between the parties, the items on either side**, either in the plaint or as particulars, **the date of the last item**, *and the date of the close of the year of account* should be mentioned as that on which the cause of action accrued. Such suits are always for the balance due and not in respect of a particular item. If the account upon which a suit is based is a forgery, no decree can be passed even on the sum admitted by the defendant (*Nagina Rai* v. *Raghubar Singh*, 173 IC 256, A 1938 Pat 42).

If the account is not mutual, a suit can be brought only for those items which are within the period of three years. If there have been payments, the same can, of course, be appropriated towards discharge of the earlier items on the debit side. In fact in all cases of running account, payments are assumed to go to liquidate the earlier items in order of time (*Jiban Ram* v. *Sagarmal*, A 1933 Pat 267, 145 IC 611). As to how far it is necessary to plead balances, if any, struck during the course of dealings, *see* the next note under "Account Stated".

Particulars : Full particulars of the account which is the basis of the suit should be given in the plaint, or, if long, may be appended to the plaint. It is not sufficient that copies of ledger and day book are attached to the plaint, as they are not particulars but merely evidence of particulars. It will be convenient to specify the account by mentioning all items on debit side and on credit side in parallel

ACCOUNT STATED *(c)*

No. 8—Suit on an Account Stated

1. The plaintiffs carry on business as grain dealers at Kanpur and the defendants carry on business as sugar merchants at Muzaffarnagar.

2. The plaintiffs used to order from the defendants raw sugar from time to time on credit, and the defendants used to order *arhar* (pulse) from the plaintiffs from time to time on credit.

3. On April 20, 1983, Ramlal, the managing proprietor of the defendants came to the plaintiffs' shop and, after going through the accounts on each side, agreed that there was a balance of Rs.2,440 in favour of the plaintiffs. The said balance was entered on page 8 of the plaintiffs' *khata bahi*, and was duly signed by the said Ramlal.

4. The defendants have not paid anything since April 20,1983.

The plaintiffs claim :

Judgement for Rs.2,440 with interest from date of suit to that of payment at such rate as the court deems reasonable.

columns, with particulars of date and amount in each case, thus :

	Credit	*Rs.*		*Debit*	*Rs.*
14-7-84	Cash	1,000	20-6-84	2 qtl. of wheat	1,400
13-8-84	1 qtl. sugar	1,600	20-7-84	1 qtl. of rice	2,000
14-11-84	1 qtl. molasses	600	03-8-84	1 qtl. of ghee	8,000
15-12-84	1 qtl. gur	700	10-10-84	20 qtl. of cotton	2,000
	Total Rs.	3,900		Total Rs.	13,400
	Balance due Rs.	9,500			

(c) Where a plaintiff sets up a case on account stated, it is incumbent on him to say so in clear terms or at least to allege and prove that there were reciprocal items of accounts which were settled and adjusted between the parties and that the balance found due to the plaintiff was the result of an agreement to set-off items on one side of the account against those on the other (A 1949 Oudh 48).

'Account Stated' is an admission of a sum of money being due from the defendant to the plaintiff on account of balance of cross demands on either side. There should be a mutual account between the parties. As held by the Privy Council in *Bishun Chand* v. *Girdhari Lal*. A 1934 PC 147, 150 IC 6, "the essence of account

No. 9—Suit on Original Account, with Alternative Claim on Account Stated

1. The plaintiffs carry on business as grain dealers at Agra, and the defendants is a sugar merchant at Meerut.

2. In the month of May, 1991, it was agreed between the parties by exchange of letters that the plaintiffs would send as much *arhar dal* to the defendants as the latter would order, and the defendants would send as much raw sugar to the plaintiffs as they would, from time to time, order in writing, and that at the end of the year, an account would be made of the price and cost of the *dal* and raw sugar supplied by the plaintiffs and defendants respectively and the balance due from one party to the other would be paid in cash. It was also agreed that interest would be calculated on each item at 9 per cent per annum.

3. From June 1, 1991 to April 10, 1993, Rs.54,560 became due to the plaintiffs from the defendants on account of the price and other charges of *arhar* purchased by the defendants from the plaintiffs, and Rs.52,120 became due to the defendants on account of the price and other charges of sugar purchased by the plaintiffs from the defendants from time to time.

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stated is not the character of the items on one side or the other; but the fact that there are cross items of accounts and that the parties mutually agree to the several amounts of each and by treating the items so agreed on one side as discharging the items on the other side *pro tanto*, go on to agree that the balance only is payable". The rule does not depend on the character or the origin of the debits or credits on either side.

"Account Stated" furnishes a distinct cause of action for a suit, and fresh time of three years is allowed from the date of such account, if made in writing and signed by the defendant or his duly authorised agent or, if there is a simultaneous agreement in writing and signed as aforesaid making the debt payable at a future date, then from such future date (Article 26), even though some of the items were time barred when the account was made and a suit for them would not have been maintainable independently (*Ashby* v. *James*, (1843) 11 M & W 542; *Ram Lochan* v. *Ram Narain*, 167 IC 652, A 1937 Pat 348; *Nabendranath* v. *Shasibindu*, A 1941 Cal 395; *Bishun Chand* v. *Girdharilal*, A 1934 PC 147—cases decided with reference to Limitation Act, 1908, Article 64). But if the account stated is not signed, the plaintiff can succeed only in respect of such items as are within the ordinary period of limitation, as Article 64 or Article 26 would not apply (*Thakurya* v. *Sheo Singh*, 2 A 872; see also, *Raghunath* v. *Kanailal*, A 1962 Cal 97; *Naranappa* v. *Gurappa*, A 1954 Mys 23; *Puttilal Kunjilal* v. *Jagnnath*, 1935 ALJ 33, A 1935 All 53; *Abdul*

Full particulars of items on each side of the account are given at the foot of the plaint (*or*, are appended to the plaint, and the plaintiffs pray that they may be treated as part of the plaint).

4. The mutual account between the parties has been kept according to the calendar year and the last entry in the aforesaid account was that of April 10, 1993.

5. On May, 30, 1993, Ramlal, the managing proprietor of the defendant's shop came to the shop of the plaintiffs, and, after going through the accounts on each side, agreed that there was a balance of Rs.2,440 in favour of the plaintiffs. The said balance was entered by the said Ramlal, on page 8 of the plaintiffs' *khata bahi*, and was duly signed by him.

6. The defendants have not paid the amount or any part thereof, and the plaintiffs claim it either as balance due on the original account or, in the alternative, balance found due to the plaintiffs on account stated between the parties.

The plaintiffs claim :

(1) Judgment for Rs.2,440 principal and Rs.881 interest; and

Aziz v. *Munnalal*, A 1921 All 325 DB; *Firm Gulabrai* v. *Firm Habibux*, A 1945 All 185; *Atmaram* v. *Lalji*, A 1940 Bom 158; *H. Naik* v. *Panchanam*, A 1954 Ori 7).

Strictly speaking, an "account stated" should extinguish all previous demands and the only suit that could be brought should be on the account stated, but it has been held in some cases that an "account stated" does not itself extinguish or supersede or alter the previous debts (*Fidgett* v. *Penny*, 1 CM & R 108; *Smith* v. *Page*, 15 M & W 683; *Bhatu Das* v. *Mt. Bibi*, 63 IC 280 Pat). It is sometimes safer to base a claim alternatively on the original demands and the account stated, for, if the plaintiff fails to prove the former, or any flaw is found in the latter, the suit may not fail (*see chapters* VII and VIII of Part I, *ante*). But the suit on original demand can be brought only subject to its being within limitation. There is a broad distinction between the position where an account is rendered and where an account is stated or settled. In the former case the accounting party must satisfy the court that the account was correctly rendered but in the latter case the person entitled to an account is bound by the account unless it can be reopened (*Ramlal Sao* v. *Tansingh Lal Singh*, A 1952 Nag 135). See further under "Defence" below.

Suits on Balance : If a balance struck is "not an account stated" but a mere acknowledgment of the correctness of the creditor's account, it cannot form the basis of suit, which should be brought on the original transactions (*Gaya Prasad* v. *Ram Dayal*, 23 A 502; *Shanker* v. *Mukta* 22 B 513; *Dukhi* v. *Mahomed*, 10 C 284; *Reotiram* v. *Lachman*, 23 ALJ 900, A 1926 All 155, 89 IC 402; *Deodat* v. *Mahraj Lal*,

(2) Interest from the date of suit to that of payment at such rate as the court deems reasonable.

No. 10—Similar Suit between Principal and a Commission Agent

1. In the month of *Baisakh* 2039 *Sambat* (corresponding to .....), at Delhi it was verbally agreed between the plaintiff and the defendant that the plaintiff would act as the *pucca arthia* or commission agent of the defendant in Delhi on *inter alia* the following terms and conditions:

(a) That the plaintiff would supply to the defendant cloth, silver, gold. lace, *gota* and other articles of general merchandise and the defendant would pay to the plaintiff the value thereof and the charges as stated below:

A 1928 Oudh 529), unless it is accompanied by a promise to pay and the acknowledgment of balance cannot be pleaded except to save limitation, though it may be proved at the trial to show the truth of the plaintiff's claim and to throw the *onus* on defendant to explain why he did so (*Muhammad Bakeh* v. *Shadi*, 100 IC 60, 27 PLR 768, 8 Lah 123, A 1927 Lah 272 DB). But if the acknowledgment is accompanied by a promise to pay, it becomes a new contract on which a suit can be brought (*Marimuthu* v. *Saminatha*, 21 M 366; *Sheogobind* v. *Jai Sri Singh*, 130 IC 503, 8 OWN 126, A 1931 Oudh 97). The promise may be oral or in writing but if the acknowledgment is of a barred debt, the promise must be in writing (Section 25 (3), Contract Act). It is not necessary that in the writing itself the consideration is described as past debt so long as it was such debt and was known to the debtor as such (*Kastur Chand* v. *Manak Chand*, A 1943 Bom 447). In this case the debt which was undoubtedly a time-barred debt was described as a cash loan. The promise need not be express but it may be implied from the writing or from the conduct (*Bajranglal* v. *Anandi Lal*, A 1944 Nag 124). In some decisions, it has been *held* that an acknowledgment of the correctness of balance always implies a promise to pay and a suit can be based on it (*Chunilal* v. *Laxman*, 23 BLR 606, 63 IC 923; *Belgaum Bank* v. *Bandu*, A 1945 Bom 359; *Gopal Das* v. *Ramnath*, 124 IC 624; *Punjab Ram* v. *Jowaya*, A 1933 Lah 47, 141 IC 425; *Bai Shanta* v. *Trikamalal*, A 1944 Bom 19; *Ram Shah* v. *Lalchand*, A 1940 PC 63, 187 IC 233; *Ratan Lal* v. *Rajmal*, 1939 AMLJ 137; *Mohan Lal* v. *Ram Chandra*, 1939 AMLJ 147). But it has been held in other decisions that the promise implied in acknowledgment cannot operate on a barred debt as it cannot be said to be in writing (*Suraiya Begum* v. *Hamid Ali*, A 1949 Oudh 48; *Shiva Ram* v. *Gulab Chand*, A 1941 Nag 100, 194 IC 806; *Ganesh Prasad* v. *Mt. Rambali*, A 1942 Nag 92). But if there is a promise to pay interest, it will be sufficient as that implies a promise to pay principal also (*Tulsiram* v. *Zaboo Bhima Shanker*, A 1949 Nag 229). The promise referred to in section 25 (3) of Contract Act, must be an express one (*Govinda* v. *Achuttan*, A 1940 Mad 678, 1940 MWN 443; *N. Ethirajulu Naidu* v. *K.R. Chinnikrishnan*, A 1975 Mad 333;

Name of Commodity		*Charges*
Cloth	Commission	at .....p.c.
	Dharmada	at .....p.c.
	Gaushala	at .....p.c.
	Cartage	at .....per package
	Iron hoops	at .....per package
	Sewing charges	at .....per package

State of Orissa v. *Chandan Singh*, (1976) 42 CLT 244; *Jeev Raj* v. *Lalchand*, A 1969 Raj 192 FB; *Tulsi Ram* v. *Same Singh*, A 1981 Delhi 165).

Two cases were decreed by the Allahabad High Court in which the suits appeared to have been brought on balance struck, but that was not because a suit merely on a balance or acknowledgment was held to be maintainable, but a point was stretched and the facts that there was a general reference to old accounts and that the plaintiff had given evidence of it were held to be sufficient indications of the plaintiff's intention to sue, not on the balances, but on original account (*Bholanath* v. *Net Ram*, 3 ALJ 800; *Kallu* v. *Bhagirath*, 40 IC 58). The headnote of 40 IC 58 is misleading. Similar was the case of *Ganpat Rai* v. *Nihal Devi*, 89 IC 366, A 1926 Lah 160. But the plaints in all these cases were bad according to the principles of pleading, as they did not contain particulars of the old accounts, and as it is not always easy to persuade courts to condone such defects in pleadings, and therefore, it will not be expedient to regard them as precedents.

When, therefore, there has been no fresh promise to pay, a suit should be brought not on the balance, but on original transactions which should be pleaded with particulars, and the striking of balance need not be pleaded, except when necessary for extension of limitation. If the intention is merely to extend limitation, even then it will require a stamp (*Pachkodi* v. *Krishnaji*, A 1947 Nag 145; *Culia Manilal Moti Ram* v. *Natwarlal Gokuldas*, A 1947 Bom 337, 49 BLR 81). Where a promise to pay it, or to pay interest, is also expressly added, the entry need not be pleaded, except when necessary for extension of the period of limitation. If a suit is brought on the balance and the new promise both should be alleged with sufficient particulars. When there is an "account stated", or a balance made and signed by the debtor and an agreement to pay it endorsed under the balance, in the course of large dealings, it is unnecessary to plead the account or transactions previous to such account stated or striking of balance, but the latter alone need be pleaded along with subsequent transactions. A suit may be based in the alternative on such new contract and on the old transactions. It must, however, be kept in view that

Gold and Silver	Commission	at .....p.c.
Lace and *gota*	Commission	at .....p.c.
General merchandise	Commission	at .....p.c.
	Dharmada	at .....p.c.
	Gaushala	at .....p.c.
	Packing and forwarding charges	at actual

(b) That the plaintiff would sell the commodities sent by the defendant to him and would credit the sale proceeds to the defendant and would be entitled to the following charges in respect thereof:

Commission	at	..... p.c.
Brokerage	at	..... per qtl.
Dharmada	at	..... p.c.
Gaushala	at	..... p.c.
Weighment and labour charges	at	..... per qtl.

(c) That the defendant would pay to the plaintiff all other usual and incidental charges and expenses beside the charges mentioned above.

(d) That the plaintiff would, at his discretion, advance sums of money, and supply articles of personal use, to the defendant and the defendant would repay the money so advanced and pay the price of articles supplied.

(e) That one account would be kept of all the dealings and transactions between the parties.

(f) That the account would be adjusted in Delhi at the close of every *Sambat* year and the dues of the plaintiff would be paid in Delhi.

(g) That the plaintiff would send from time to time to the defendant accounts of the dealings and transactions, and if no objection be raised by the defendant within a month of the receipt of any account, the same should be treated as correct.

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mere balance of accounts in a book of account does not, by itself, constitute an account stated, much less does it constitute an account settled (*Sheo Bhagwan* v. *Mst. Durga Bai Devi*, 1974 MPLJ 689; see also, *Bansidhar* v. *A.C. Banerji*, (1935) 40 CWN 130; *Pratapchand* v. *Purushottam*, (1915) 8 BLR 124; *Tripathi* v. *Rama Reddy*,

(h) That interest on all dues would be paid at one per cent per month compoundable every year.

2. That business between the parties commenced from *Baisakh Badi* 2039 and continued up to *Bhadon Badi* 2, 2044 on the aforesaid terms. Particulars of the account between the parties are given in the account appended to the plaint which should be considered as part hereof. The last item in the account is of date *Bhadon Badi* 2, 2044 (corresponding to .....).

3. Accounts were adjusted from time to time. The last of such adjustments took place on *Bhadon Sudi* 13, 2044 (corresponding to .....) and the sum of Rs.6,954.62 was found due by the defendant to the plaintiff. The defendant acknowledged in writing his liability to pay the same with interest. The said acknowledgment was endorsed on the plaintiff's *Khata Bahi* at page 8 and was signed by the defendant.

4. According to the account appended to the plaint, as well as according to the account stated referred to in para 3 of this plaint there is now due and owing by the defendant to the plaintiff the sum of Rs.6,954.62 for principal and Rs.182.33 for interest, total Rs.7,136.95 which or any portion whereof the defendant has not paid.

The plaintiff claims:

(1) Judgment for Rs.7,136.95.

(2) Interest from date of suit to date of payment at such rate as the court deems reasonable.

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21 Mad 49; *Govind* v. *Balwant Rao*, 22 Bom 986; *Hiralal* v. *Badpulal*, A 1953 SC 225).

A balance of account, or account stated, written in the creditor's book and signed by the debtor should be stamped with requisite revenue stamp, as an "acknowledgment", if the intention of the writing is to supply evidence of the debt, but if the intention is only to admit the correctness of the balance, then revenue stamp is not necessary and then it will not amount to "acknowledgment." If the intention is merely to extend limitation, even then it will not require a stamp (*Manilal* v. *Natwarlal*, A 1947 Bom 337). Where a promise to pay it, or to pay interest, is also expressly added, the entry always requires to be stamped as a bond or promissory note (*Prahlad* v. *Bhagwan Das*, 100 IC 593). **As an unstamped acknowledgment or promissory note cannot be admitted in evidence even on payment of a penalty**, it should never be made the basis of a suit, otherwise the suit will necessarily fail. An acknowledgment, coupled with a promise to pay, if attested by a witness becomes

No. 11—Suit for Reopening Account

1. The plaintiff owns several houses, shops and other estates in Mussoorie which are specified in Schedule A appended to the plaint and the defendant is a house agent.

2. By an agreement in writing contained in his letter dated the 20th October, 1990 to the defendant, the plaintiff appointed the defendant as his house agent at Mussoorie. It was agreed that the defendant would realise the rent of the said houses, shops and other estates and after defraying the necessary expenses of repairs, taxes and cost of establishment and deducting his own commission at 5% on rents and 5% on the cost of repairs, would pay the balance to the plaintiff. It was also agreed that he would submit accounts of receipts and expenditure annually in the month of January.

3. On the 15th January, 1992, the defendant submitted a statement of account for the year 1991 and the plaintiff accepted the said statement of account without scrutiny.

4. The plaintiff has lately discovered that there are various fraudulent entries and omission in the said statement of account. The false entries and omissions so far discovered are detailed below:

1.

2.

3.

4.

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a bond, and can be admitted in evidence on payment of stamp deficiency and penalty. If a suit is brought, not on the basis of a balance but on the original transaction entered in the plaintiff's *bahi khata* the transactions alone, with particulars, need be pleaded. The entries supporting them need not be referred to in the plaint, as is generally done because that would be referring to the evidence of the claim. It is equally wrong to designate such suits on the basis of *bahi khata*. Such suits are either for money lent or for the price of articles delivered and *bahi khata* is only evidence of them.

Limitation is governed by Article 26.

Defence : Balance written in plaintiff's *bahi khata* and signed by the defendant is not always stamped. Want of stamp, if the balance is over Rs. 20, is an excellent defence to a suit on the balance. The defendant may plead that the balance was wrong as there were substantial mistakes in the items, but he should give particulars of such mistakes or he may show the plaintiff's fraud in inducing

The plaintiff claims :

(1) That the said account be reopened, or that liberty be given to him to scrutinise the account to falsify the items in the said account on the ground of fraud and for material error.

(2) Payment to the plaintiff of such sum as may be found due to him on the taking of accounts.

AGENT *(d)*

No. 12—Suit by an Agent for his Commission

1. By an agreement in writing, dated January 22, 1994 the defendant appointed the plaintiff as his agent for sale of an estate known as the Chandala Estate and agreed to pay to the plaintiff as his commission.

him to believe that the items were correct, e.g., that the rates entered in the account-books were wrong and different from the market rates, as it is always permissible to reopen even a settled account, if mistake or fraud is shown (*Bhagwan* v. *Damodarji*, 42 A 230, 59 IC 20, 18 ALJ 100; *Baney Madhub* v. *Subal*, 11 CWN 776; *A. Rahim* v. *H. V. Low & Co*, 3 R 1, A 1925 Rang 210; *Jaigovind* v. *Mt. Hiria*, A 1941 Pat 433, 196 IC 220). Grounds for reopening the account must be specified or substantial mistakes or fraud should be alleged, mere unreasonableness of certain items is not fraud (*Bajranglal* v. *Anandilal*, A 1944 Nag 124). He may show that there was no consideration for the transactions for which the account was stated, or that it was illegal or that the agreement was void, e.g., that the transactions were wagering contracts. It is not necessary in order to seek reopening of a settled account that fraud should be shown. It is sufficient if error of sufficient magnitude and in sufficient number can be shown (*Bachhey* v. *Gundoo*, A 1933 Oudh 557). But it is no defence that there was a subsequent account stated showing a balance in defendant's favour. In such a case a definite plea of payment should be raised. That there are other unsettled accounts between the parties is also no defence (*Ram Nath* v. *Pitamb Deb*, 34 C 733, 21 CWN 632, 31 IC 430).

(d) Section 211-225 of the Contract Act lay down the duties of a principal to his agent and of an agent to his principal. Any breach of any such duty furnishes cause of action for a suit even though no fraud is proved. In every suit between principal and agent, **fact and particulars showing how and when the relation of principal and agent arose should be set out in the plaint.** All the terms of the agency need not be set out, but only those which are material to the case should be alleged. **The breach of statutory or contractual duty which is the cause of action for the suit should be definitely alleged.**

As no consideration is necessary to create an agency (section 185, Contract Act), it is not necessary to allege the consideration in the plaint, unless it is material to the suit. For example, in a suit for damages against an agent for not using due

5 per cent on the price received by the defendant for the said estate in the event of the plaintiff introducing a purchaser acceptable to the defendant.

2. The plaintiff accordingly introduced one Ram Bihari Lal as a purchaser of the estate for a price of Rs.5,00,000. A sale deed was executed by the defendant in favour of the said Ram Bihari Lal, in respect of the estate, and the said Ram Bihari Lal paid Rs.5,00,000 in cash to the defendant at the time of sale-deed, on April 28, 1994.

3. The defendant has not paid the commission due to the plaintiff under the terms of the agreement of January 22, 1994 or any part thereof.

The plaintiff claims judgment for Rs.25,000 and interest from date of suit to that of payment at such rate as the court may deem reasonable.

No. 13—Suit Against *del credere* Agent for Price of Goods

1. By an oral agreement made on the 2nd March, 1987 the plaintiff appointed the defendant his agent for the sale of plaintiff's books upon the terms that he would be paid 15 per cent commission on all sales, and that he would be responsible to the plaintiff for the discharge by the buyers of their contractual obligations.

2. Between the 2nd March, 1987 and the 18th May, 1988 the plaintiff under instructions from the defendant delivered books to various buyers but the buyers have not yet paid the price. The names of the buyers and the books sent to them, with the dates on which they were sent respectively and also the price are mentioned in the Schedule appended at the foot of the plaint.

3. As per statement in the schedule at the foot of plaint a sum of Rs.____ is due to the plaintiff.

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care and diligence, or for disregarding instructions, it is not necessary to allege the commission fixed, but in a suit by an agent for recovery of the commission, it would be necessary to allege what commission was fixed by the contract. Even if an agent is appointed to enter into wagering contracts on behalf of his principal, the contract of agency is not void, and the agent can, therefore, recover his commission and can be indemnified for any loss he has suffered (*Sobhagmal* v.*Mukund Chand*, A 1926 PC 119, referred to in *Ram Prasad* v. *Ramjilal*, 25 ALJ 736; *Perosha* v. *Monekji*, 23 B 899; *Bankeylal* v. *Bhagirath*, 1939 AWR (HC) 819, 1939 ALJ 1073, A1940 All 95, 186 IC 511; *Gopaldas* v. *Manik Lal*, A 1941 Cal 125, 193 IC 603). Even if loss is

The plaintiff claims Rs.____ with interest from date of suit to that of realisation at ten per cent per annum.

No. 14—Suit against an Agent for disregarding Instructions

1. By a letter, dated December 20, 1983, the plaintiff employed the defendant as his commission agent to purchase, at Kiratpur market, 200 quintals of best white sugar at a price not exceeding Rs.400 per quintal, and to despatch the same to the plaintiff at Patna. The plaintiff had also expressly notified to the defendant, by the same letter, that there was no market at Patna for any but white sugar, and therefore the defendant should not send any but the best white sugar.

2. The defendant, although he could easily have purchased for plaintiff, at Kiratpur market, 200 quintals of best white sugar within the said limit of price, neglected to do so. He purchased for the plaintiff 200 quintals of sugar of much inferior quality at Rs.350 per quintal and despatched the same to the plaintiff.

3. The plaintiff has suffered damage to the extent of Rs.4,000.

Particulars : After defraying all expenses, the plaintiff would have made a profit of Rs.20 per quintal (or Rs.4,000 in all) by the sale of the best white sugar at Patna. With great difficulty he has been able to sell the sugar sent by the defendant at the cost price and thus the plaintiff did not make any profit.

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incurred in the wagering contracts and the agent has actually paid it to a third person, he can recover it from the principal (*Shibhomal* v. *Lachman*, 23 A 165), but in such cases, he should definitely allege in the plaint not only the loss, but the fact of his having paid it. If profit results from the transaction and it is realised by the agent, he is liable to pay it to the principal (*Hardeo* v. *Ram Prasad*, 25 ALJ 223; *Nagendrabala* v. *Gurudayal*, 30 C 1011).

A *pucca arhtiya* or a *del credere* agent is, however, not a commission agent in this sense but is in essence a principal; accordingly, he cannot recover damages for breach of a wagering contract (*Firm Sagar Mal* v. *Bishambher Sabei*, A 1947 All 14; see also, *Sheonarain* v. *Bhalla*, A 1950 All 352; *C.S.T.* v. *Bishambhar Singh*, (1981) 2 SCC 27). In case of misconduct or negligence the principal can sue for damages, and this is in addition to forfeiture of commission (*Vasanta* v.*Gopala*, 1939 MWN 1046(2)). When an agent was employed to purchase the property on behalf of his principal and he does so in his own name, then, upon conveyance or transfer of the property to the agent, he stands as a trustee for the principal. The

The plaintiff claims Rs.4000 as damages, with interest from the date of suit to that of payment at such rate as the court deems reasonable.

No. 15—Suit for Breach of Contract Alternatively Against a Principal and an Alleged Agent

1. On the 1st March, 1988, defendant No. 2 orally represented himself to be the agent of defendant No.1 for the purchase of wheat and thereby induced the plaintiff to sell to the defendant No.1, two thousand bags of wheat (each containing one quintal) at Rs.205 per quintal and it was agreed that the said bags would be taken delivery of at the plaintiff's godowns in Hapur Mandi on payment of the price on or before the 15th May, 1988.

2. Defendant No. 2 by his said representation impliedly warranted his authority to buy the said goods from the plaintiff on behalf of defendant No.1 and the plaintiff entered into the said contract of sale of wheat on the faith of such warranty.

3. Neither of defendants took delivery of the bags of wheat nor paid the price. On the 15th May, 1988, the plaintiff wrote to the defendant No. 1 offering delivery of the said goods and demanding the price thereof. Defendant No.1, however, denied that he had authorised defendant No.2 to buy the goods from the plaintiff and refused to take delivery or pay the price of the goods.

4. By reason of the premises the plaintiff has suffered damages, particulars of which are given below.

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property in the hands of the agent is for the principal and the agent stands in the fiduciary capacity for the beneficial interest he had in the property as a trustee. The agent has a duty and responsibility to make over the unauthorised profits or benefits he derived while acting as an agent or a trustee and property account for the same to the Principal. Section 4 of the Benami Transactions (Prohibition) Act does not stand in the way of the plaintiff's suit for declaration of title and possession of the suit property (*P. V. Sankara Kurup* v. *Leelavathy Nambiar*, A 1994 SC 2694, (1994)6 SCC 68).

Where the principal sells export licence or quota paper granted under the Export Control Order to a third party by resorting to subterfuges and thereby circumventing the provisions of Export Control Order, he cannot recover from the agent the price and profits realised from such sale, because both the parties are in *pari delicto* and the mixim *ex turpi causa* would apply. The court would not lend its help to a party who bases his claim upon an immoral act (*Nathmal Bhirobux & Co.*,

Particulars

Contract price of 2,000 bags	Rs. 4,10,000
Market price on the 15th May, 1988 at Rs. 190 per quintal	Rs. 3,80,000
Difference	Rs. 30,000

5. The plaintiff claims Rs. 30,000 as damages from defendant No.1 if it is found that defendant No.2 was his agent to buy the wheat from the plaintiff, and alternatively from defendant No.2 in case it is found that he was not the agent of defendant No.1, with interest from the date of suit to that of payment at such rate as the court deems reasonable.

No. 16—Suit by an Agent for Money paid on behalf of the Principal

1. The plaintiff carries on business as a commission agent at Delhi, and the defendant carries on grain business at Rohtak.

2. The defendant, by his letter dated October 25, 1994, appointed the plaintiff as his commission agent for the purchase and sale of grain under the instructions of the defendant and by the same letter, agreed to pay a commission of one per cent on every transaction of purchase and sale, and interest on any sum spent by the plaintiff for the defendant at one per cent per mensem (*or*, agreed to pay the "usual" commission and interest, and the usual and customary rate of commission on such transactions then was one per cent and the customary rate of interest was one per cent per mensem).

3. The defendant, by the said letter, also instructed the plaintiff to purchase for him 200 bags of wheat and to keep them with the plaintiff until further orders.

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v. *Kashi Ram*, A 1973 Raj 273).

The position of a broker is that of an agent. A broker engaged to purchase shares stands for his principal to purchase the shares. When a man is authorised to do a certain act it must necessarily be presumed that he has been authorised to do all such acts as must be performed to complete the transaction (A 1951 Hyd 47, 7 DLR 28 Hyd).

It is obvious that an agent is not personally bound by a contract entered into on behalf of disclosed principal in the absence of a contract to that effect; but every

4. The plaintiff purchased the said quantity of wheat for the defendant at a cost of Rs.____ particulars of which are given in the account at the foot of the plaint.

5. The defendant by letter dated November 30, 1994 instructed the plaintiff to sell the said 200 bags of wheat at the market rate. The plaintiff sold the said bags of wheat and realised Rs.____ as per account given below.

6. The defendant sent Rs.____ to the plaintiff on November 4, 1994, and has not paid the rest, or any part thereof.

The plaintiff claims :

(1) Rs.____ on account of the balance of what he had to spend for the defendant, and his commission and interest as per account given below.

(2) Interest from the date of suit to that of payment.

Particulars of Account

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No. 17—Like Suit by a Commission Agent in Respect of *Khatti* Transactions

1. The plaintiff has an *arhat* shop at Shamli and deals in the purchase and sale of *khattis*, or grain-pits as commission agent of others.

2. The custom of the market at Shamli, with regard to the purchase of *khattis*, is that the purchaser pays to the agent, through whom he makes the purchase, Rs.5,000 per *khatti* of wheat and Rs.6,000 per *khatti* of gram as advance money, that if the agent finds the market going down and loss on the transaction imminent, he is entitled to call upon his principal (the purchaser) to deposit more advance money as security against loss. and in case the principal fails to comply with the demand, the agent is empowered to sell the *khattis* at the market rate, and to recover from his principal any loss he has in consequence to pay on his behalf. It is also the

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agent who undertakes personal responsibility for payment is personally liable and be sued in his own name on the contract unless the other contracting party elects to give exclusive credit to the principal (*Babu Lal* v. *Jagat Narain*, A 1952 VP 51).

Under section 230 of the Indian Contract Act, in the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on

custom of Shamli market that on *khatti* transactions the principal pays to his commission agent commission at one per cent, brokerage at ten paise per cent, charity at 3 paise per cent and *gaoshala expenses* at 2 paisa per cent, contribution to school at 2 paisa per cent, and servant's expenses (*shagirdi)* and correspondence expenses, each at ten rupees per *khatti.* It is also the custom of the Shamli market that the commission agent receives interest on money spent on behalf of his principal, and pays interest on money realised, at one per cent per mensem.

3. On July 28, 1982 the defendant purchased through the plaintiff two grain-pits of wheat at Rs.210 per quintal and two of gram at Rs.250 per quintal from Sada Sukh, and deposited Rs.22,000 as advance money.

4. At the time of the aforesaid purchase, the plaintiff had verbally informed the defendant that the purchase would be subject to the conditions of the custom mentioned in para 2 above and the defendant had expressly agreed to all those conditions. The plaintiff bases his claim alternatively on the said custom or on the verbal agreement alleged in this paragraph.

5. The rate of wheat and gram began to fall soon after the aforesaid purchase and on September 6, 1982, the rate of wheat was Rs.205 and that of gram Rs.220 per quintal.

6. On the said September 6, 1982 the plaintiff sent by registered post, a notice to the defendant calling upon him to send more advance money and expressly notifying to him that in case of non-compliance with the demand within one week of the receipt of notice, the plaintiff would sell the *khattis.* This notice was delivered to the defendant on September 8, 1982.

7. No reply was received from the defendant and the plaintiff then, on September 20, 1982 sent a reminder through a special messenger Ram Sukh, a servant of the plaintiff.

8. On this, the defendant sent his *munim* Mussaddi Lal on September 25, 1982, and the said Mussaddi Lal asked the plaintiff, on the defendant's behalf to sell the *khattis.*

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behalf of his principal nor is he personally bound by them. Such a contract shall be presumed to exist in the following cases - (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad (2) where the agent does not disclose the name of his principal, and (3) where the principal

9. The plaintiff sold the *khattis* to Ram Bilas at the market rate on September 25, 1982, i.e., wheat at Rs.206 and gram at Rs.222 per quintal.

10. Alternatively, if it be not proved that the said Mussaddi Lal instructed the plaintiff to sell the *khattis*, or if it turns out that Mussaddi Lal had no authority on behalf of the defendant to give such instructions, the plaintiff states that the sale by him was in exercise of his power under the custom alleged in para 2, or under the verbal agreement referred to in para 4 of this plaint.

11. The plaintiff has paid Sada Sukh the price of the *khattis* on behalf of the defendant, and after deducting from the same the sum the defendant paid as advance and that realised by sale of the *khattis*, Rs._____ is due to the plaintiff from the defendant.

Particulars of the account are given at the foot of the plaint (or appended to the plaint, and the plaintiff prays that the same may be treated as part thereof).

The plaintiff claims Rs.____ with interest from the date of suit to that of payment.

No. 18—Suit Against an Agent for Secret Commission Received by Him (Impleading the other Principal)

1. The plaintiff is, and at all material times was, the proprietor of the Flour Mill known as the Star Flour Mill situated at Meerut.

2. By an oral agreement made between the plaintiff and defendant No.1 on 3rd February, 1988, the plaintiff appointed the defendant No.1 as his agent at Hapur for the purchase of wheat for the said flour mill and the terms of the said agreement were that before the beginning of the wheat season the defendant No.1 would obtain tenders from sellers of wheat for delivery at the factory and pass them on to the plaintiff with his recommendation, the plaintiff would enter into contracts with the tenderers whose tenders would be accepted by him and the defendant No.1 would

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though disclosed cannot be sued. [*Radakrishna* v. *Tayibali*, A 1962 SC 538, 546]. Where the principal is disclosed but he could not be sued eg., the foreign sovereign or Ambassador, the agent will be presumed to be personally liable (*Abdul Ali* v. *Ghodstein*, 43 PR 1910; *Ramchand* v. *Ismail Khan*, 113 IC 345).

Limitation : for most of the suit between principal and agent is three years, under one of the following articles— 1, 2, 3, 23, 55—where the suit is based on

be paid by the plaintiff a commission of two per cent on the price paid by the plaintiff for the wheat purchased by him from tenders obtained by the defendant No.1.

3. On the 14th March 1988, defendant No.1 sent to the plaintiff a tender of defendant No.2 for sale of 10,000 quintals of wheat at Rs.180 per quintal and advised that the said tender be accepted.

4. The plaintiff accepted the said tender on the 25th March, 1988 acting on the advice of defendant No.1, and entered into a formal contract with defendant No.2.

5. Between the 15th April, 1988 and 20th May, 1988 the whole of 10,000 quintals of wheat was delivered by defendant No.2, and the plaintiff paid him Rs.____ as price and on the 1st June, 1988 paid defendant No.1 Rs.____ as his commission.

6. On the 10th July, 1988, the plaintiff discovered that before submitting his above-mentioned tender, defendant No.2 with a view to inducing defendant No.1 to recommend his tender for acceptance by the plaintiff corruptly agreed to pay to defendant No.1 a secret commission at the rate of Rs.5 per quintal on the quantity of wheat contracted to be purchased by the plaintiff and inserted in the tender a rate which was in excess of forward contract rate of wheat at the time in Hapur Mandi and of the rate at which defendant No.2 would have himself otherwise tendered by Rs.5 per quintal. Defendant No.1 was induced by the said secret commission or bribe to recommend the tender of defendant No.2 to the plaintiff.

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breach of term of an agreement, even if it is registered, Limitation would be three years under Article 55 of the Limitation Act 1963.

To suits for misappropriation Article 3 applies and not Article 4, as "misconduct" referred to in the latter does not include everything that in ordinary parlance be called "misconduct" but means only misconduct of the agent in the business of the agency (*Kinattinkara* v. *Manavikrama*, 109 IC 332. A 1928 Mad 906 DB, decided with reference to Articles 89 & 90 of the old Act). A savings bank clerk of a bank has been held to be the bank's agent and if he misconducts himself and the bank suffers losses, the bank's suit was held to be governed by Article 90 (*The Benares Bank* v. *Ram Prasad*, 1930 ALJ 1153). If the agent sends accounts to his principal and admits certain sum to be due from him, a suit for the sum was held to be governed by Article 64 of the Act of 1908 (corresponding to Article 26 of Act of 1963) (*Lachminariain* v. *Murlidhar*, A 1937 Cal 535).

7. The price paid by the plaintiff to defendant No.2 for the said wheat exceeded by a sum of Rs.____ the price which the defendant No.2 would have received had it not been for the payment of the secret commission.

8. Defendant No.1 has secretly and corruptly received the said commission of Rs.____ from defendant No.2 on the 25th May, 1988.

The plaintiff claims Rs.____ from the defendants.

No. 19—Like Suit Against Agent alone

1. On September 4, 1994, the plaintiff verbally employed the defendant as his agent to buy furniture for him on commission.

2. The defendant as such agent, bought for the plaintiff, furniture worth Rs.42,000 from Abdul Ali, furniture merchant of Bareilly, on September 20, 1994, and, in effecting such purchase, secretly and corruptly received for himself, from the said Abdul Ali a commission of Rs.2,200, which he has not paid over to the plaintiff.

The plaintiff claims Rs.2,200 with interest from date of suit to that of payment.

No. 20—Suit Against an Agent for Damages for not Using Due Care and Diligence

1. On June 14, 1993, the plaintiff employed the defendant as his paid *karinda* to collect rents from the tenants of the plaintiff's shops in the Palika Bazar Commercial Complex at Ghaziabad.

2. The defendant did not collect all the rents, and has conducted his work so negligently that the plaintiff has suffered damage.

Defence : In an agent's suit the principal may plead that the agent acted in disregard of his instructions, or that he acted on his own account in the business of the agency and that therefore the defendant is entitled to repudiate the transaction (section 215 Contract Act). If the suit is for recovery of what the agent had to pay on behalf of the principal on account of wagering transactions, the defendant may show that the plaintiff entered into the contracts with the defendant on his own account and not as an agent. In a suit for remuneration by the agent, the principal may plead that the business of the agency has not yet terminated or that the agent has been guilty of misconduct (section 219, 220, Contract Act), e.g., that he made secret profits (*Harivallabh Das* v. *Bhai Jiwanji*, 26 B 689). Particulars of the alleged misconduct must be given. To a suit for damages for breach of duty or negligence in the performance of duty it is no defence that the defendant's motives were

Particulars :

(i) The defendant neglected to demand payment of Rs.3,750 due as rent for July, 1993 from Raju Traders, and the claims for the said rent has become time barred.

(ii) The defendant neglected to realise Rs.3,200 from Krishna Electronics who sold away all his movable and left the place and is untraceable, and the amount has thus been lost to the plaintiff.

The plaintiff claims Rs.6,950 with interest from the date of suit to that of payment.

ASSIGNMENT *(e)*

No. 21—Suit by an Assignee of a Debt

1. The defendant No.1 borrowed Rs.2,000 from defendant No.2 on a bond dated October 25, 1992, and agreed to repay the loan, with interest at one per cent per mensem, within six months of the date of the bond.

2. The said defendant No.2 assigned the debt due under the said bond from the said defendant No.1 absolutely to the plaintiff by a sale-deed dated April 20, 1995.

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untainted with fraud (*Richard Phillip* v. *W.F. Barns*, 171 IC 487, A 1937 PC 314), but to a suit on the ground of instructions, agent may plead that his acts were the acts of a prudent man and were performed at a time of emergency (*Har Kishen* v. *National Bank*, A 1940 Lah 412).

(e) An assignment of a debt or other "actionable claims" is valid and the assignee can sue for it in his own name, even if it is an assignment of part of a debt (*Travancore N.Bank Co.*,v. *T.N. Q.Bank*, 1939 MWN 1054), but an assignee of a part cannot sue for that part only, he must sue for the whole (*Tulsiram* v. *Firm Gianchand*, A 1940 Lah 96; *Mohanlal* v. *Bala Bux*, A 1940 Lah 279, 189 IC 253). To such a suit, the assignor is not a necessary party (section 130, Transfer of Property Act), though as a matter of practice, he is usually impleaded as a *proforma* defendant, but where the plaintiff is assignee of a part of the debt, the assignor or transferees of other part must be impleaded (*Firm Ram Kishen* v. *Firm Gurdial*, A 1941 Lah 337; *Murlidhar* v. *Rikhi Ram*, 43 PLR 444). But if no notice of assignment, as provided by section 131, is given to the debtor, and the debtor was no party to the assignment, he can pay the debt to the assignor in spite of the assignment. In such cases, if there is a suspicion that the assignor has realised any portion of the debt or the debtor has given out that he has paid it to the assignor it is always better to implead the assignor also as a defendant and to claim from him whatever may be

3. The defendant No.1 has not paid the debt due from him or any part thereof.

The plaintiff claims:

(1) Judgment against defendant No.1, for Rs.2,000 on account of principal, and Rs.720 on account of interest up to the date of suit.

(2) If the said defendant No.1 proves that he has paid any part of the said sum to the said defendant No.2, judgment for the said amount with interest from the date of such payment to the date of suit at one per cent per mensem against defendant No.2.

(3) Interest from date of suit to that of payment at such rate as the court deems reasonable.

No. 22—Like Suit, When the Assignment was of Sum Due and of Other Money to Become Due in Future

1. By a contract in writing dated June 20, 1994, it was agreed between the defendant and one Murad Ali that the said Murad Ali should construct, for the defendant, a shop in the New Muzaffarnagar according to a plan which is embodied in the said agreement, for a sum of Rs.55,000

found to have been realised by him. If a plaintiff has to implead the assignor and to claim this relief from him, by reason of the debtor's allegation of payment to the latter, and no such payment is established, the debtor, and not the plaintiff, should be made liable for the costs of the assignor. The promisee of the promissory note who endorsed it to the plaintiff is a necessary party to the suit for recovery of the dues under the note from the promisor (*Thambusami Raddiar* v. *Savarimutham*, A 1954 Mad 960).

An "actionable claim" can be transferred only by a written instrument which need not be registered, but a negotiable instrument may be transferred by endorsement. The form of endorsement will decide whether only the pronote has been transferred or also the debt. In the former case assignee cannot sue on debt (*Mohd. Sharif* v. *Abdul Rahman*, A 1966 Mad 50). In Punjab where the Transfer of Property Act did not apply oral assignment of pronote has been held valid (*Brijlal* v. *Dhanna*, 164 IC 271, A 1936 Lah 547). As Transfer of Property Act does not apply to transfers by order of court, assignment by Judge of a security given under the Guardians & Wards Act does not require a written instrument and Judge's order may be construed as a valid assignment (*Mani Devi* v. *Anupurna*, A 1943 Pat 218, 206 IC 226). A debt secured by mortgage of immovable property, or hypothecation or pledge of movable property, not being an "actionable claim", can be transferred in the way in which any other property can be transferred. Right to recover a partner's share in a partnership is an actionable claim (*Pulchand* v. *Sham Das*,

to be paid by the defendant to Murad Ali as follows : Rs.5,000 when the foundations have been filled up; Rs. 22,000 when the outer room and verandah have been constructed; and Rs. 28,000 on completion of the whole building.

2. The said sums of money were absolutely assigned to the plaintiff by the said Murad Ali, by a sale-deed dated September 21, 1994.

3. At the time of the said assignment, the said foundation had been all filled up, and Rs.5,000 had become due to Murad Ali under the said agreement on August 20, 1994 and after the said assignment and before this suit, all the buildings have, according to the plan given in the said agreement, been constructed and finally completed, i.e., the outer room and verandah had been completed on November 21, 1994 and the rest on July 20, 1995 and the said two further sums of Rs.22,000 and Rs.28,000 respectively have become due from the defendant under the said agreement.

A 1941 Sindh 731). An order for payment of money is not an assignment (*Kisen Gopal* v. *L.J. Bavin*, A 1926 Cal 447, 42 CLJ 43, 89 IC 735 DB), nor does a deposit of a cheque amounts to an assignment (*D.B. Ballabhdas* v. *Seth Narain Prasad*, A 1926 Nag 206). The particular mode of transfer should be specified in the plaint and, if the transfer was by a writing, the writing must be identified. It should be stated whether the assignment was absolute or by way of security for a loan.

But a transferee of a *mere right to sue* (not amounting to an actionable claim) cannot maintain a suit, as such transfer is legally void (section 6, Transfer of Property Act), e.g., a right to sue for unliquidated damages as mesne profits or for compensation for a tort is not transferable (*Abu* v. *Chunder*, 36 C 345; *Hari Chand* v. *Nem Chand*, 47 B 719; *Gopala* v. *Gopalaswami*, 22 MLJ 207, 10 IC 320; *Prag* v. *Fatechand*, 5 A 207; *Niadar* v. *Mukhtar*, 17 ALJ 837; *State of Madhya Pradesh* v. *Bahmanchi Byamji*, 1976 MPLJ 535). But assignment of rent due under a lease is valid. (*Chidambaram* v. *Doraiswamy*, 31 IC 473 Mad).

An agreement specifying a future fund for payment may amount to an equitable assignment and give the assignee preference over other creditors (*P. Venkat Rao* v. *M. Chinna Venkatna Pully*, A 1965 AP 410). An endorsement on the bill for realisation of the amount coupled with power of attorney amounted to an equitable assignment and for that reason the attachment of the amount of the bill by another creditor was not upheld (*Bharat Nidhi* v. *Takhat Mal*, A 1969 SC 313).

Transfer of an actionable claim in favour of a judge, legal practitioner or an officer of the court is invalid, and such transferee cannot maintain a suit (section 136, Transfer of Property Act). For example, if a pleader purchases a property, and arrears of rent in respect thereof by a sale-deed, he cannot bring a suit for the

4. The defendant has not paid the said sums or any part thereof.

The plaintiff claims:

(1) Rs.55,000 principal and Rs.2,350 interest, calculated separately on the three sums from the dates on which each became payable, at the current rate of interest which is 12 per cent per annum.

(2) Interest from the date of suit to that of payment at such rate as the court deems reasonable.

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arrears (*Hiralal* v. *Tripura*, 40 C 650, 17 CWN 679, 17 CLJ 438, 19 IC 129), or if an Honorary Magistrate purchases a bond (*Sitlabux Singh* v. *Mahabir Pd.*, 162 IC 229, A 1926 Oudh 275).

A contract of purchase and sale of goods is not an actionable claim and is not assignable except with the consent of the other party to the contract, in which case it becomes a novation of contract. Therefore an assignee of such a contract cannot sue for damages for its breach (*Tod* v. *Lachmidas*, 16 B 441). But a debt due to the vendor's creditors and left by the vendor with the vendee for payment to his creditor but not paid to him, may be assigned by the vendor (*Agrenath* v. *Ramratan*, A 1938 All 544, 177 IC 700, 1938 ALJ 851).

No notice of assignment is necessary to be given to the debtor, and if one has been given, it need not be alleged in the plaint. It can be proved, if necessary, in reply to the defendant's plea of payment to the assignor. To plead before hand that, if the defendant has paid anything to the assignor, the payment does not absolve him from liability as he had been given notice of assignment would be "leaping before you come to the stile".

In a suit by an assignee, the date of assignment is sometimes mentioned as that of accrual of the cause of action for the suit. The assignment is no doubt part of the cause of action of the plaintiff, but the date on which the cause of action for the suit arises is the date on which breach is committed by the defendant, entitling the other party to bring the suit. For instance, in a suit for money due on a bond payable on demand instituted by an assignee of the bond, the date of the bond should be mentioned as that on which the cause of action arose.

Limitation is the same whether the suit is filed by the assignee or by the assignor.

Defence: Any defect in the form of assignment may be pleaded. It may be shown that the right was not assignable, e.g. that it was a mere right to sue, or that it offended section 136, Transfer of Property Act. The defendant may plead payment to the assignor, if he was not a party to the assignment and no valid notice of assignment was given to him. As an assignee takes subject to all the equities to which the assignor was subject, the defendant may claim any set off which he might have claimed against the assignor (section 132). The defendant cannot plead that the assignment was without consideration (*Sathu* v. *Dagdu*, 9 BLR 462; *Baldeo* v. *Behari*, 13 ALJ 19; *Narain Food Products* v. *Tikam Chand*, A 1933 All 573). He

BOND *(f)*

No. 23—Suit on a Simple Money Bond

1. On January 2, 1992, the defendant borrowed Rs.2,500 from the plaintiff, and, in consideration of the loan, executed a bond agreeing to pay Rs.2,500 on demand with interest at 12 per cent per annum, with half yearly rests (*or*, in consideration of Rs.2,500 due to the plaintiff from the

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can, however, in a suit on a promissory note plead want of consideration for the assignment if he wants further to plead that the promissory note was itself without consideration, for he cannot raise the latter plea in a suit by an assignee for consideration (*Hazarilal* v. *Tulsiram*, 11 ALJ 481, 19 IC 637). He can, therefore, raise the latter plea only if he is prepared to raise the former. The Bombay High Court, however allowed, the plea that the transaction was colourable and was intended to defraud the defendant (*Mulji* v. *Nathubhai*, 15 B 1).

(f) A bond may provide for payment of money by the obligor, either on demand, or at a certain specified time, or on the happening of a contingency. There are mainly two kinds of bonds: (1) simple money bonds without any condition or penalty, and (2) bonds with specified condition, i.e., annuity bonds or security bonds. In a suit to enforce any bond, **the fact of its due execution by the obligor, the passing of the consideration, the rate of interest, if any, and the terms, and the breach thereof which has given rise to the occasion to sue must be stated in the plaint.** But no condition or term of the bond which is not necessary for the purpose of the suit need be stated. In case of an instalment bond **the due dates of the instalments, and if any have been paid, the actual dates and amounts of such payments should be given as particulars. Where** there is a condition of the whole becoming due, in case of default in payment of any instalment, and the suit is brought after the expiration of the period of limitation from the date of the default, it is better to give the precise words of the bonds as to the condition of acceleration, so as to show whether the plaintiff was bound to sue for the whole on the occurrence of the default or the suit was optional. If the plaintiff has waived his right to enforce payment of the whole money, and he claims money payable on account of the unpaid instalments or brings a suit for the whole by reason of any subsequent default, **he must clearly allege the waiver in the plaint,** for, if no waiver is alleged, one will not be presumed from mere abstention to sue (*Bahuram* v. *Jodha*, 11 ALJ 89; *Jadav* v. *Bhairab*, 31 C 502; *Venkata* v. *Naidu*, 5 MLJ 241; *Kanhai* v. *Amrit*, 23 ALJ 424, 87 IC 927, A 1925 All 499). The burden of proving the waiver, if denied by the defendant, will be on the plaintiff. If the waiver was made by an express agreement between the parties, the agreement should be pleaded in the plaint with all necessary particulars, like any other agreement. If the waiver is sought to be inferred from the plaintiff's conduct, such as that of accepting payment of overdue instalments, the plaintiff should give particulars of that conduct, along with the allegation of waiver of the benefit of the acceleration clause. For example, if the act of waiver relied upon

defendant on account of price of cloth purchased, the defendant executed a bond on January 2, 1992, agreeing to pay to the plaintiff, on or before April 2, 1992, the sum of Rs.2,500 with interest at 12 per cent per annum).

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the acceptance of overdue instalments, those must be mentioned with particulars as to date, amount, etc. **Demand of payment** of money due under a bond is not necessary to be pleaded even when the bond is payable on demand, for *a previous demand is not part of the cause of action*, and a suit cannot be dismissed merely on the ground that no such demand was made. If the defendant pleads that he did not pay the money as the same was not demanded, and he pays it into court, the question whether the plaintiff had made a previous demand or not can then be inquired into in order to determine whether the plaintiff should or should not get his costs. The plaintiff will not, in such a case, be debarred from showing that he had demanded the money by the fact that it was not alleged in the plaint. If however, money is made payable under the bond at a specified time after demand, a previous demand would be necessary and it should be pleaded with specification of date, as the cause of action in such case arises from the expiry of the specified period after the demand.

Suits on security bonds also are brought in the same way as on ordinary simple bonds, **the conditions of the security, and their breach being clearly specified as far as possible in the terms of the bond.** A regular suit lies even for the enforcement of a security bond given for the performance of any decree or part thereof, or for the restitution of any property taken in execution or for the payment of any money or for the fulfillment of any condition imposed on any person under an order of the court in any suit or any proceedings consequent thereon. In such cases the decree or order can also be executed against the surety to the extent of his personal liability under the bond (section 145, C.P.C.), as an alternative remedy. Where a security bond is offered under O. 41, R. 6 and property worth more than Rs. 100 is mortgaged such a security bond is not exempt from registration (*Bishnath Sahu* v. *Prayagdin*, 1958 ALJ 353; *Sonatun Shaha* v. *Dina Nath Shaha*, 26 Cal 222; *Nagarum Sambayya* v. *Tangatur Subayya*, 31 Mad 330; *River Steam Navigation Co.* v. *Jaim Mulla*, A 1957 Assam 157).

A proceeding under section 145 C.P.C. cannot be for anything but for enforcing the personal liability of the surety (*Thankamma* v. *Parameshwaram Achari*, 1971 KLR 440). If the security bond is not personal but is a hypothecation bond, a regular suit for its enforcement will be necessary (*Amir* v. *Madhadeo*, 39 A 225, 15 ALJ 76, 38 IC 33.). But see *Beti Mahalakshmi* v. *Chaudhri Badan Singh*, 21 ALJ 604, in which it has been held that even a hypothecation security bond can be enforced against the executant in execution proceedings. Section 145 C.P.C. does not apply to proceedings for the enforcement of a surety bond taken by the decree-holder outside the court, and such bond has to be enforced by suit (*Subbarya* v. *Sathanath*, 24 MLT 516, 48 IC 940, 1918 MWN 764). A security bond given by a

2. The defendant has not paid the loan, or any part thereof (*or*, the defendant has paid Rs.1,100 on February 2, 1993, Rs.400 on May 3, 1993 and Rs.400 on August 4, 1994 but has not paid the rest of the debt or any part thereof).

1. The plaintiff claims :

(1) Rs. _____ as per account given below.

(2) Interest from the date of suit to date of payment at such rate as the court may deem reasonable.

Account

* * *

No. 24—Suit on an Instalment Bond

1. On May 2,1981 the defendant in consideration of a loan advanced to him by the plaintiff, executed in favour of the plaintiff an instalment bond for Rs.1,200 agreeing to pay the said amount in monthly instalments of Rs.200 each on the first day of every month beginning from July 1, 1981 (*or*, in the following instalments: July 1, 1981, Rs.200; July 1,

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guardian of a minor to the court appointing him, can, on breach of the undertaking by the guardian, be enforced by any person, as trustee for the ward, to whom the court assigns it under section 35, Guardians and Wards Act. This assignment can be made even after the ward has attained majority but must be made before the suit (*Mani Devi* v. *Anpurna*, A 1943 Pat 218, 206 IC 226). A security bond given in favour of court can be proceeded with in execution by the decree-holder even without an assignment (*V.S. Swaminatha Iyer* v. *K.S. Srinivasa Ammal*, (1970) 2 MLJ 636). If the undertaking of the surety in the bond is that the amount can be recovered from him if the defendant failed to pay, then the liability of the surety can be enforced in execution on failure of judgment debtor to pay (*Ram Gopal* v. *Parbati Devi*, 1979 All WR 392).

Limitation for a suit on a simple money bond is three years from the date fixed for payment, or if no such date is fixed, from the date of its execution (Articles 28 and 29 of the Act of 1963). The limitation for an instalment bond is prescribed by Article 36 and 37 of the Act.

The language of Articles 36 and 37 of the Act of 1963 is identical with that of Articles 74 and 75 of the Act of 1908. Article 36 will apply to cases where the suit is for the recovery of instalments as such and not for the recovery of the whole amount on the basis that it has fallen due because of some default. On the other hand, where the whole amount falls due on one or more defaults being committed and the whole amount is claimed in the suit the proper Article to be applied will be Article 37. In cases where there is default clause making the whole due on one or

1982, Rs.200; July 1, 1983, Rs.200; July 1, 1984, Rs.200; July 1, 1985, Rs.200; and July 1, 1986, Rs.200). The defendant further agreed by the said bond that, in case default was made in the payment of any instalment, the whole amount then remaining due should at once become payable.

2. The defendant paid the first instalment on the due date. He did not pay the second instalment on the due date, but when he came to pay it three days later, i.e., on July 4, 1982, the plaintiff accepted the payment and verbally agreed to waive the benefit of the acceleration clause in the bond, in so far as that default was concerned.

3. The defendant has not paid any other instalment, and the plaintiff, therefore, claims the whole amount under the acceleration clause by reason of default in payment of the third instalment.

The plaintiff claims Rs.800, with interest from the date of suit to that of payment at such rate as the court deems reasonable.

No. 25—Suit on a Bond for the Fidelity of a Clerk

(Form No. 18, App. A., C.P.C.)

1. On the__day of_____19__, the plaintiff took *EF* into his employment as a clerk.

2. In consideration thereof, on the __ day of _____19__, the defendant agreed with the plaintiff that if *EF* should not faithfully perform his duties as a clerk to the plaintiff, or should fail to account to the plaintiff for all monies, evidences of debt or other property received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss he might sustain by reason thereof, not exceeding _____ rupees.

(*Or*, 2. In consideration thereof, the defendant by his bond of the

more defaults it is open to the creditor to waive the benefit of the provision relating to defaults. If there is such waiver, limitation under Article 37 will start from the date of a fresh default which is not waived. Whether a default has been waived or not is essentially a question of fact (*Jawahar Lal* v. *Mathura Prasad*, A 1934 All 661 FB; *Sukhlal* v. *Bhura*, A 1934 All 1039; *Gokul Mohton* v. *Sheo Prasad Lal Seth*, A 1939 Pat 433 FB; *Arjun Sahai* v. *Pitambar Das*, A 1963 All 278). The distinction in the earlier Act between registered and unregistered bonds has been removed under the Act of 1963, and the limitation for both kinds of bonds is three years only.

Defence : In a suit on a bond for cash consideration, the defendant may plead that he did not receive full or any consideration. He may plead a payment, or discharge, or satisfaction. If breach of any condition is alleged in the plaint, he may

same date bound himself to pay the plaintiff the penal sum of ___ rupees, subject to the condition that if *EF* should faithfully perform his duties as clerk and cashier to the plaintiff and should justly account to the plaintiff for all monies, evidences of debt or other property which should be at any time held by him in trust for the plaintiff, the bond should be void).

(*Or*. 2. In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff, and the original document is hereto annexed).

3. Between the __ day of _____ 19__, and the ___ day _____ of 19__, *EF* received money and other property amounting to the value of _____ rupees, for the use of plaintiff, for which sum he has not accounted to him, and the same still remains due and unpaid.

No. 26—Suit on a Security Bond

1. On November 20, 1990, the plaintiff took one Khuda Baksh into his employment as a *karinda* for collection of rent.

2. In consideration thereof, the defendant, by his bond of the same date agreed with the plaintiff that if the said Khuda Baksh should not faithfully perform his duties as a *karinda* to the plaintiff or should fail honestly to account to the plaintiff for all monies received by him for the use of the plaintiff, the defendant would pay to the plaintiff whatever loss the plaintiff might sustain by reason of the said *Khuda Baksh's* said default not exceeding the sum of Rs.4,000 with interest at 6 per cent per annum.

3. The said Khuda Baksh did not during his said employment faithfully discharge his duties as a *karinda*, nor did he honestly account for nor pay over to the plaintiff, all moneys coming to his hands on behalf of the plaintiff. Between November 20, 1990 and June 15, 1992 Khuda Baksh collected rents amounting to Rs.1,900 for the plaintiff, and the same still remains due and unpaid.

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deny the breach or may plead any valid excuse for it. If the Bond is enforceable on the happening of any contingency, the defendant may plead that the contingency has not yet happened. He may plead that he was a surety for the other executant (*Mulchand* v. *Madho*, 10 A 421; *Sheo Prasad* v. *Govind Prasad*, 49 A 464 at p. 468); but the Calcutta and Rangoon High Courts have held that evidence is inadmissible to prove that an executant who purports to be a principal was really a surety (*Maung Kogyi* v. *U. Kyaw*, 103 IC 79; *Harekchand* v. *Bishanchandra*, 8 CWN 101).

The plaintiff claims a decree for Rs.1,900 principal and Rs.___ interest, with further interest from the date of suit to that of payment at such rate as the court deems reasonable.

CANCELLATION OF AN INSTRUMENT *(g)*

No. 27—Suit for Cancellation of a Sale Deed Executed by a Minor

1. The plaintiff was born in 1985, and therefore is, and on June 3, 1995, was a minor.

2. On June 3, 1995, the plaintiff executed a deed of sale of his farm (*khasra* No.83) in village Rasulpur in consideration of the defendant promising to pay him Rs.51,000 in three months.

3. The defendant on June 5, 1995 applied to the Tahsildar for mutation of his name, and the plaintiff has reasonable apprehension that if the sale-deed is left outstanding [illegible] possession of the said farm of the plaintiff.

The plaintiff claims to have the said sale-deed adjudged void and cancelled.

No. 28—Suit for Cancellation of a Deed of Gift Obtained by Undue Influence

1. The plaintiff's son Ram Kumar was, in June 1994 employed by the defendant as *karinda* to collect rents from his tenants.

2. On June 13, 1994 the said Ram Kumar realised as such *karinda* Rs.2,000 on account of rents due to the defendant from a tenant Krishna.

He may plead that the bond was delivered conditionally or for a special purpose or as a collateral security for another undertaking. Evidence of this defence would be admissible under proviso 3 to Section 92, Evidence Act (*Sheo Prasad* v. *Govind Prasad*, 49 A 464, 100 IC 332).

(g) Some of these suits also fall under the heading "Suits for Torts" as they are based on fraud or undue influence. In a suit for cancellation of an instrument, the plaintiff must show— (1) that the instrument is void or voidable at his option, and (2) that he has a reasonable apprehension that the instrument, if left outstanding, may cause him serious injury (section 31 Specific Relief Act of 1963). A plaint in such a suit should, therefore, contain (i) **a short reference to the instrument and its effect, (ii) a recital of facts making it void or voidable, and (iii) an allegation of the occasion for the suit, showing the serious injury the instrument is likely to cause to the plaintiff.** There should be a definite prayer for cancellation. It is not sufficient

The said Ram Kumar did not credit the said item of Rs.2,000 in the account books, nor did he account for it to the defendant, but converted the money to his own use.

3. The defendant threatened the plaintiff that unless the plaintiff paid him Rs.2,000 and further made a gift of his house in Banker's Street, Meerut, to him, the defendant would prosecute the said Ram Kumar.

4. The plaintiff was, at the time, in great mental distress, and had no independent advice, and was, by reason of the said threat of the defendant, induced to execute a deed of gift in respect of the said house in favour of the defendant on July 20, 1994.

5. The defendant has sent a notice to the plaintiff calling upon him to deliver possession of the house to the defendant and the plaintiff apprehends that if the deed of gift is left outstanding the plaintiff will be deprived of the possession of the said house.

The plaintiff claims to have the said deed of gift adjudged void and cancelled.

No. 29—Cancellation of a Sale-deed Obtained Without Plaintiff's Consent and by Defendant's Fraud

1. The plaintiff is a *pardanashin* and illiterate widow, and the defendant is her brother's son who has been managing her property ever

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to ask for a declaration that the deed is null and void in cases of voidable instruments (*Varadachar* v. *Dasappa*, 14 Mys LJ 256). Such a suit can be brought also by the legal representative of the person who had executed the instrument (*Shravan* v. *Kashiram*, 100 IC 932, 51 B 133, 29 BLR 115), or even by a person not a party to the instrument (Abdul *Jabbar* v. *Ganesh*, 1938 MLJ 54; *Indramani* v. *Hena Dibya*, A 1977 Ori 88). In a case, where plaintiff is seeking to have the document avoided or cancelled, necessarily, a declaration has to be given by the court in that behalf. Until the document is avoided or cancelled by proper declaration, the duly registered document remains valid and binds the parties (*Ramti Devi* v. *Union of India*, 1995 All CJ 99 SC).

It is neither sufficient, nor necessary to say that the instrument is void or voidable, for that is after all an inference of law, but facts which make it voidable, should be alleged, e.g., that the plaintiff was a minor or a person of unsound mind when he executed it or that it was executed under coercion or undue influence. Any instrument which is not legally enforceable is void whether it is so for any reason given in the Contract Act or for any other reason, e.g., because it is a forgery

since the death of her husband three years ago, and the plaintiff always reposed implicit confidence in him and had no other independent advice.

2. On December 20, 1994, the defendant verbally represented to the plaintiff that it would facilitate the transaction of the plaintiff's business by the defendant if the plaintiff executed a general power of attorney in defendant's favour. The plaintiff assented to the proposal, and asked the defendant to have a proper deed drawn up.

3. On December 22,1994 the defendant brought to the plaintiff a document and represented that it was a general power of attorney and induced the plaintiff by such representation to affix her thumb mark to it.

4. Later on the same day, December 22, 1994, the defendant brought the Sub-Registrar of Ghazipur to the plaintiff's house. The said Sub-Registrar did not read out or explain the contents of the deed to the plaintiff but simply asked her whether she had put her thumb mark on it. The

(*Venkata* v. *Kadambi*, 7 MLJ 270).

When an instrument is not wholly void or voidable, it may be cancelled partially (Section 32, Specific Relief Act of 1963). But plaintiff cannot get any relief by pleading his own fraud which has been carried out (*K.M. Esof* v. *Hamida Bibi*, 163 IC 671, A 1936 Rang 218; *Nawabsingh* v. *Saljitsingh*, 162 IC 958, A 1936 All 401; *Hafizulla* v. *Ally Mulla*, 164 IC 914, A 1936 Rang 405; *Nambippa* v. *Muthuswamy*, 163 IC 711, A 1936 Mad 630).

The injury apprehended should be real and not imaginary and the apprehension must be reasonable, for instance, when a sale deed is registered at the request of the vendee inspite of the denial of execution by the vendor (*Mohima* v. *Jugal Kishore*, 7 C 736), or where the defendant makes an application for entry of his name in the village register under the void deed. But, where a suit on the forged bond is already pending and the plaintiff has set up a plea that the bond is void, a suit for cancellation is not necessary (*Chogan* v. *Dhondu*, 27 B 607).

A sale-deed of a holding, not legally transferable is void, but it can do no injury to the vendor, so long as he remains in possession, and need not, therefore, be cancelled. When the plaintiff is in peaceful possession of the property, in spite of an instrument which the defendant is setting up against a third person in a proceedings which will not be binding on the plaintiff, the plaintiff cannot be said to have any reasonable apprehension of injury (*Narendra* v. *Basudeo*, 14 IC 81 Oudh). Where thumb impressions of an illiterate lady are obtained on the sale deed representing that she was executing gift deed in favour of her daughter, the misrepresentation was as to the character of the document, the sale deed was a totally void document and not a voidable document (*Dularia Devi* v. *Janardhan Singh*, A 1990 SC 1173).

Minor : A minor's contract is void, hence he can have it cancelled. If the

plaintiff admitted having done so, and the Sub-Registrar thereupon got her thumb mark affixed at another place on the said deed.

5. The representation of the defendant that the deed was a general power of attorney was false. The plaintiff has now, on January 30, 1996 learned that the deed was a deed of sale in favour of the defendant in

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minor was old enough to commit a fraud by inducing others to think that he was of age, he cannot take advantage of it, and if the court cannot restore the parties to their original footing the minor would be bound by his contract as if he were an adult (*Leslie Ltd.* v. *Sheill*, (1914) 3 KB 607, 83 LJKB 1145, 111 LT 106, 58 SJ 453, 30 TLR 460; *Mahommed Syedol* v. *Yeob*, 39 IC 401, 21 CWN 257, 1917 MWN 162, 19 BLR 157). But this rule is not applicable where the minor has not received any advantage and the effect of avoiding the transfer will only be to restore the parties to their original position (*Ganganand* v. *Sir Rameshwar Singh*, 102 IC 449 Pat). A contract by a minor being void, the fact that he made a false representation as to his age at the time of the contract, cannot make a difference. There is no estoppel and no rule of equity entitling the court to enforce the contract (*Ajodhia Prasad* v. *Chandar Lal*, A 1937 All 610 (FB)).

Simply allowing another person to deal with him as if he was an adult or doing acts which only an adult can properly do, is not, however, sufficient to constitute a fraudulent misrepresentation on the part of the minor (*Ganganand* v. *Sir Rameshwar Singh*, 102 IC 449 Pat). Where a person under the guardianship of Court of Wards simply stated that he was 20 years of age without disclosing the fact that he was a ward of the Court of Wards, it was held that the suppression amounted to misrepresentation (Budha v. *Lakshmi*, A 1929 Lah 880, 30 PLR 584 DB).

It has been held that even when the minor has represented that he was of age and the other party acted on such representation, still the minor is not estopped from proving his minority (*Koduri* v. *Shumuluir*, 94 IC 853, A 1926 Mad 603; *Radha Kishan* v. *Bhorey*, 26 ALJ 837, 110 IC 373, A 1928 All 626; *Ajodhia Prasad* v. *Chandar Lal*, A 1937 All 610; *Gulabchand* v. *Chunnilal*, A 1929 Nag 156; *Gadigeppa* v. *Balangowda*, 55 B 741, 33 BLR 1313, A 1931 Bom 561; *Manmatha Kumar Saha* v. *Exchange Loan Co.*, A 1936 Cal 567; *Rangarai* v. *Sant Chogmal Verdi Chand & Co.*, A 1934 Mad 560; *Ganga Nand Singh* v. *Rameshwar Singh*, A 1927 Pat 271 DB; *Lala Somnath* v. *Ambika Prasad Dubey*, A 1950 All 121). But in such cases the benefit received by the minor under the sale-deed should be refunded before the sale is set aside though ordinarily a minor is not required to refund the benefit received under a void contract (*Hanmatha Rao* v. *Sitaramayya*, 1938 MWN 1076, 48 LW 604; *Abdul Subhan* v. *Nusrat Ali*, 165 IC 523, A 1937 Oudh 170; *Manmath* v. *Exchange Loan Co.*, 165 IC 363, A 1936 Cal 567). But if he made no representation or was not guilty of any fraud, he is not liable at all for mere failure to reveal his age when no inquiry was made from him (*Sherkhan* v. *Akhtarkhan*, 168 IC 730, A 1937

respect of the plaintiff's share in land in village Nalagarh.

6. The defendant well knew that the said representation was false, and he made the same fraudulently with a view to inducing the plaintiff to affix her thumb mark on the deed and to admit the execution of the deed before the Sub-Registrar.

7. The plaintiff has learned that the defendant has made an application to the Tahsildar for mutation of his name on the plaintiff's said land in village Nalagarh and she apprehends that she will be deprived of the said property.

Lah 598), and if the vendee knew of the vendor's minority, he is not entitled to refund of the price paid (*Mt. Bachai* v. *Hayat Mohammad*, A 1940 Oudh 119, 185 IC 337), nor is he liable by reason of merely making a false representation unless the transaction had been the consequence of such representation (*Ko Maung U.* v. *Ma Hai On*, A 1939 Rang 399).

When the minor has made a false or fraudulent representation as to his age and has thereby obtained some advantage, the court in the exercise of its equitable jurisdiction intervenes in such cases and restores the parties to original position. In this connection section 33 of the Specific Relief Act (Section 41 of the old Act) may be referred to. The Court directs the minor to restore the benefit obtained by him (*Appasami* v. *Narayana Swami*, A 1930 Mad 945; *Ajudhia Prasad* v. *Chandar Lal*, A 1937 All 610 FB), when the minor is the plaintiff and brings suit for cancellation of a document. But when the minor is a defendant, section 33 of Specific Relief Act would not apply and it would not be possible to pass a decree for money against a minor because that may amount to enforcing a void contract, although where a contract of transfer of property is involved such property can be ordered to be restored to the plaintiff (*Manmatha Kumar Saha* v. *Exchange Loan Co.*, A 1936 Cal 567; *Tikki Lal* v. *Komal Chand*, A 1940 Nag 327).

Court-fee : A suit for cancellation of an instrument is one for a declaration with a consequential relief, and court-fee is payable on the amount at which the relief sought is valued. Document executed by guardian not only for himself but also on behalf of minor, the minor is also a party to the document and court fee is payable under section 7(iv)(a) (*Surajparsad* v. *Gangannath Parasad*, 1954 ALJ 710). If the plaintiff was no party to an instrument, e.g., if the suit is by a Hindu son for setting aside a deed of gift made by his father, there need not be a prayer for cancellation, but a declaration that the deed is null and void will be sufficient. A prayer for cancellation is properly necessary when the plaintiff was himself a party to the instrument, or if he was a minor and his duly appointed guardian made a transfer on his behalf with the permission of the court. Even if the plaintiff was a party to the deed, he can allege that the deed was sham and nominal and confers no title on the defendant and claim a declaration of his own title and injunction against

The plaintiff, therefore, claims to have the said deed of sale adjudged void and cancelled.

No. 30—Cancellation of Will Executed while Executant was not in his Proper Senses

1. One Ram Prasad, who owned considerable property, died on April 16, 1995.

2. The plaintiff is the daughter of the said Ram Prasad, and no

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defendant's interference with his possession, and he need not in such a case pray for cancellation of the deed (*Sahid Hameed* v. *K.C.P. Mohindeen*, A 1948 Mad 451, 1948 MLJ 270, 1948 MWN 259). But, in either case, for the purpose of court-fee the suit should be regarded as one for declaration with a consequential relief (*Babu Rao* v. *Balaji Rao*, 118 IC 465, A 1929 Nag 71; *Arunachalam* v. *Rangasamy*, 38 M 922). Even if the suit is framed as one for declaration, if cancellation is necessarily implied, court-fee must be paid *ad valorem*, e.g. in a suit for declaration that a compromise decree is not binding on the plaintiff, cancellation of the decree is implied (*A.C.T.N. Chidambaram* v. *A.D.T.N. Nagappa*, A 1944 Mad 478). A suit for declaration that property purchased by plaintiff was not subject to *waqf* without an express prayer for cancellation of *waqfnama* was held to be in essence one for cancellation (*Kamala Devi* v. *Sunni Central Board*, A 1949 All 63). It has been held that court is merely to look at relief as framed and that court-fee cannot be ordered to be paid in respect of implied consequential prayers (*Khatoon Iqbal Begum* v. *State of U.P.*, 1971 All WR 719). If in a suit for cancellation of a deed of gift, relief of possession is also added, no court-fee on the latter relief is required as that is only ancillary to the main claim (*Thangochi* v. *Moideen*, A 1933 Mad 231; *Hajrabi* v. *Md Ibrahim*, A 1948 Nag 219). Where the plaintiff as a minor is a a party to a deed executed by the guardian he must sue for cancellation and also for possession (*Shanker Narayan Pillai* v. *Kandesami Pillai*, A 1956 Mad 670 FB).

Limitation is three years under Article 59 of Act of 1963, but if a document is null and void or evidences a transaction which is so from its very inception, it is not necessary to have it cancelled and a suit for a declaration that it is null and void may be brought within three years under Article 113 and a suit for possession of property conveyed by it can be brought within 12 years. The three years period of limitation is to be computed from the date when the facts entitling the plaintiff to have the instrument or decree set aside or cancelled became first known to him (*Cheddi* v. *Indrapati*, A 1972 All 446). For cases on this point under the Limitation Act, 1908, see, *Muhammad Nazir* v. *Mt. Zulaikha*, 6 ALJ 289, 50 A 510, A 1928 All 267, 109 IC 54 DB; *Krishna Swami* v. *Kuppu*, A 1929 Mad 478, 30 MLW 796; *Mst.* v. *Kundan*, A 1945 All 37. For cases under Limitation Act 1963, see *Dashrath* v. *Shatruhan Singh*, 1977 MPLJ 167; *Bilat Das* v. *Babuji Das*, 1981 BLJR 556).

Defence : In such cases defence is generally the denial of facts making the

nearer relation of the latter was in existence at the time of his death. The defendant is his sister's son.

3. The defendant has applied for mutation of his name on the property of the said Ram Prasad on the basis of a will alleged to have been executed in his favour by the said Ram Prasad on April 15, 1995.

4. The said will set up by the defendant was never executed by the said Ram Prasad.

5. In the alternative, the said will was not executed by the said Ram Prasad while he was in his proper senses; the said Ram Prasad had suffered a stroke of cerebral thrombosis about a month before his death and had, during the week before his death, became extremely weak in body and mind and was unable to move from his bed and was incapable of understanding his affairs and of forming any rational judgment concerning them. During the last three days of his life, i.e., April 14, 15 and 16, 1995, he was totally unconscious and could not hear or talk to any one.

The plaintiff claims:

(1) A declaration that the said will was never executed by said Ram Prasad.

(2) In the alternative to have the said will adjudged void and cancelled.

CARRIERS see Railways and Carriers, *post*.

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contracts void or voidable. The defendant may claim refund of the benefit received by the plaintiff under the instrument as a condition precedent of its cancellation (section 33 Specific Relief Act of 1963) (*Abdul Majid* v. *Ramiza*, 1931 MWN 150, A 1931 Mad 468, 131 IC 153, case under section 41 of the Specific Relief Act 1877). It may be pleaded that the suit is unnecessary as the instrument is void in law and cannot do any harm to the plaintiff, as a sale-deed of an occupancy holding; or that the decree would be useless as when the defendant is in possession of the property conveyed under the instrument. He may plead that both the parties were equally guilty of fraud (*Bindeshri* v. *Lekhrai*, 33 IC 711, 1 Pat LJ 48). In a suit where the plaintiff bases his title on inheritance, as in precedent No. 30 above, he has to show that the deceased had left no nearer heir (*Dulhin Mahabati Kuer* v. *Raghunandan*. A 1958 Pat 249). Even if the defendant has failed to plead any nearer heir but has merely denied the plaintiff's title it is open to the defendant to take advantage of facts showing that the plaintiff was not the nearest heir (*Jagdish Narain* v. *Nawab Said Ahmed*. A 1946 PC 59).

CHARGE *(h)*

No. 31—Suit for Enforcement of a Charge

1. The defendant and one Ram Lal are the sons of the plaintiff.

2. By a private deed of partition, dated September 20, 1994 to which the plaintiff, defendant and the said Ram Lal were parties, the whole property left by the plaintiff's husband was divided equally between the defendant and Ram Lal, and the defendant and the said Ram Lal agreed that each of them should pay a monthly allowance of Rs.400 to the plaintiff for her life. It was further agreed that the amount of the said monthly allowance should be a charge on the shares allotted to the defendant and the said Ram Lal respectively.

3. The defendant has, since the aforesaid partition, been in possession of the share of property allotted to him and mentioned fully at the foot of the plaint.

(h) "**Charge**" differs from a mortgage in the essential circumstance that in latter there is a transfer of an interest in specific immovable property which is absent in a charge. Another distinction is that while a charge can be enforced only against a person with notice, a mortgage being a transfer of an interest in property can be enforced against subsequent transferees even if they have no notice of it. Ordinarily charge negatives a personal liability and the remedy of the chargeholder is against the property charged only, but when there is also in addition a personal covenant, the security is collateral to the personal covenant and the transaction would become a simple mortgage (*Benares Bank* v. *Har Prasad*, 163 IC 69, A 1936 Lah 482). A charge may be created by agreement as a mortgage, as well as by operation of law (e.g., the charge for unpaid purchase money on the property sold or a charge created by a decree). A charge-holder's remedy is the same as that of a simple mortgagee (Section 110, Transfer of Property Act); i.e., he can sue for realisation of his money by sale of the property charged with him.

Full Particulars of the Charge, *i.e.* when and how it was created, the property charged, the amount for which it was charged, the persons by whom, and those in whose favour, the charge was created must be mentioned in the plaint. There is no form in the Code of Civil Procedure for a suit to enforce a charge.

Any one in whose favour or for whose benefit a charge is created may sue although he was no party to the agreement (*Khwaja Muhammad Khan* v. *Hussain*, 32 A 410, 7 ALJ 71, 14 CWN 865, 12 CLJ 205, 20 MLJ 614, 12 BLR 638 PC). But a charge for unpaid purchase money cannot be so enforced as section 55 (4), Transfer of Property Act makes the property chargeable "in the hands of the buyer" (*Gur Dayal* v. *Karam Singh*, 38 A 254; *Gayatri Prasad* v. *Board of Revenue*, 1973 ALJ 412) or any transferee without consideration or any transferee with notice of non-payment.

4. The defendant has not paid aforesaid monthly allowance of Rs. 400 or any part thereof, ever since the aforesaid partition.

The plaintiff claims payment of Rs._____, principal and Rs. _____, on account of interest from the date of the partition deed, under the Interest Act at the rate of 12 per cent per annum, total Rs. _____, or in default, sale of the property mentioned at the foot of the plaint.

[For precedent of a suit for unpaid purchase money see under Sale of Land; for interest, see precedents and notes under (r), post].

CONTRIBUTION *(i)*

No. 32—Suit for Contribution Between Co-Judgement Debtors

1. The plaintiff and the two defendants are, and in 1990 were joint tenants in equal share of house No.15, Civil Lines, Mathura.

2. Ram Adhin, the landlord of the said house, obtained a decree (No.104 of 1991) from the court of the Civil Judge, Mathura, for arrears of rent of the said house for the year 1990 against the parties jointly.

3. The plaintiff and both the defendants were in default for the whole rent of the year 1990.

A charge cannot be enforced against property in the hands of a *bona fide* transferee for consideration and without notice of the charge (section 100), but a property subject to a recurring charge and sold for arrears payable in respect of the sum charged can be sold for future payments (*Jennendra Nath* v. *Sashi Mukhi*, A 1940 Cal 60; *Lakkalakrishnama Naidu* v. *Lakkala Lakshmamma*, 1973 An WR 80). For the doctrine of constructive notice and its applicability to charge on property for payment of Municipal Taxes, see *Ahmedabad Municipal Corporation* v. *Abdul Gafar Haji Hussainbhai*, A 1971 SC 1201. When the suit for money has once been brought, there is nothing to prevent a subsequent suit to enforce the charge (*Bank of Bihar Ltd.* v. *Omitave Chatterji*, 186 IC 221 Pat).

Limitation is 12 years from the date when money sued for becomes due, under Article 62 of the Act of 1963 (*Narayanbhai Mahijibhai Patel* v. *Dolatram Chouharmal*, A 1972 Guj 166).

(i) The basis of a suit for contribution is the joint liability of the parties for payment of a sum of money to a third person and payment by the plaintiff in excess of his liability. Until a plaintiff has paid more than his share of the liability, there is no right of contribution (*Dhirendra Nath* v. *Harendar Nath*, 64 CLJ 55). Where the plaintiff had merely executed a bond in favour of the creditor and had not actually

4. The said Ram Adhin put the said decree in execution and realised the whole decretal amount, viz. Rs.9,000 from the plaintiff alone.

The plaintiff, therefore, claims Rs.3,000 from the each defendants with interest from the date of suit to that of payment.

No. 33—Suit for Contribution Between Co-Sureties

1. By a bond executed on December 10, 1991, the plaintiff and the two defendants jointly and severally became sureties for one Balak Ram who had at the time, been appointed Nazir in the Munsif's Court at

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paid the money due to the creditor from him and the defendant, it was held he could not sue for contribution (*Raghubar Dayal* v. *Abdul Ghaffar*, 161 IC 152, A 1936 Oudh 253). If there are several defendants, the plaintiff cannot get a joint decree against them as that would result in a multiplicity of such suits (*Moti Chand* v. *Bajran Sahai*, 17 IC 45, 16 CLJ 148). In a suit for contribution, therefore, **the plaintiff should allege (1) facts showing the joint liability of the parties; (2) the plaintiff's share of liability for the joint debt; (3) that he has paid more than his liability and the amount of the excess; and (4) the respective liabilities of each of the defendants to contribute to the excess which the plaintiff has paid.** If the plaintiff settled the creditor's claim at a lesser amount than what was due, all the debtors must be given advantage of the reduction and contribution should, in all cases be made on the basis of what the plaintiff has actually paid. If any of the defendants has also paid a portion of the debt, he should be given credit for the same, and account of contribution should be made on the basis of the total sum paid by him and the plaintiff. Unless the account by which the liability of each defendant is worked out is a very simple one, it should be given in details as particulars of the liabilities of the defendants. The creditor or other person to whom payment has been made by the plaintiff is not a necessary party to suit for contribution.

Where, however, there is no joint liability, there is no basis for a suit for contribution. For instance, if one of the heirs of an owner of property incurs expenses in litigation against third parties, he cannot sue the other heirs for contribution to expenses, even if the latter have been incidentally benefited by the result of that litigation (*Rahaman* v. *Dillu*, 103 IC 299 Lah). But if it is shown that the plaintiff did not incur the expenditure gratuitously, he can be allowed contribution, as in case of a co-owner repairing a joint well (*Bibi Baratan* v. *Mt. Chandramani*, 167 IC 42, A 1937 Pat 103).

Question of contribution generally arise between co-debtors, co-mortgagors, co-owners, co-sureties, co-trustees, joint-tort feasors or persons having a joint liability. Except under special circumstances (e.g., the case of a definite undertaking by one partner to indemnify another) there is no contribution between partners (*Debesh Chandra* v. *Benoy Kirshna*, 43 CWN 1214). As between co-judgment debtors the judgment is conclusive as to the right of the plaintiff to the amount

Muzaffarnagar, in the penalty of Rs.1,000, for the due performance of the said Balak Ram's duties as such Nazir.

2. The said Balak Ram misappropriated Rs.600 of the Government money and a decree (No.20 of 1994) for the said amount and costs was obtained by the State Government from this court against the plaintiff.

3. The plaintiff paid Rs.696 on May 24, 1995 on account of the said decree and costs.

The plaintiff claims Rs.232 from each of the two defendants, with interest from the date of suit to that of payment.

No. 34—Suit for Contribution between Joint-Tort-Feasors

1. The plaintiff and the defendant purchased, on July 4, 1990 a house in equal shares from one Ram Narayan, in good faith believing the said Ram Narayan to be the adopted son of the former owner, Sant Lal, and remained jointly in possession of the said house from the date of purchase.

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decreed, but not as to liability of each of the defendants, unless the same has been adjudicated upon. So it is open to one co-judgment debtor to show that he is not liable for contribution as he was a surety for the other. Even if a creditor exempts one debtor from the suit and obtains a decree against the other, the latter can bring a suit for contribution against the former, in spite of the fact that a claim on the original debt would be barred against him at the time he is called upon to contribute. So, if a suit is dismissed against one defendant on the ground of limitation and is decreed against the other, whose liability was kept alive, the latter can sue the former for contribution, if he had to pay more than his share of liability (*Abraham* v. *Raphial*, 39 M 288, 17 MLJ 746, 27 IC 337, 16 MLJ 569). This rule will equally apply to a mortgage decree (*Bibari* v. *Indra*, 104 IC 206, 45 CLJ 571, 31 CWN 985, A 1927 Cal 665 DB). A decree for contribution, except one between co-mortgagors, is always personal and no charge can be claimed on the property in respect of which the plaintiff had made the payment (*Bindeshri* v. *Girdhar*, 34 IC 91 All).

Costs : Generally there is contribution in respect of costs provided the suit was *bonafide* (*Ramdeo* v. *Rai Baijnath*, 58 IC 31; *Ramsarup* v. *Baijnath*, 43 A 77, 18 ALJ 872, 58 IC 324). There is no contribution, if the parties had joined in bringing a deliberately false claim (*Kalanath* v. *Jadu Nandan*, 58 IC 28). The general rule is that there will be contribution for costs unless the defendant can show some equity which entitles him to exemption (*Baburam* v. *Badridas*, 24 ALJ 720; *Kulada Prasad* v. *Gribala*, 40 CWN 1089). For instance, he can plead that he had admitted the claim and costs were incurred simply on account of the plaintiff's contest (*Bhawani Prasad* v. *Ram Prasad*, 167 IC 913, A 1937 All 227; *Bishambhardeo* v. *Hitnarayana*, 160 IC 796, A 1936 Pat 49).

2. One Sri Narayan brought a suit (being suit No.14 of 1994) against the parties in the court of the Civil Judge at Varanasi, on the allegations that the said Ram Narayan was not the adopted son of the said Sant Lal, and that the said Sri Narayan was, nephew and heir of Sant Lal, real owner of the said house.

3. The plaintiff and the defendant agreed to defend the suit jointly but the plaintiff incurred all the costs amounting to Rs.3,200.

4. The said Sri Narayan obtained a decree for ejectment, mesne profits and costs against the parties, and realized Rs.14,000 on account of mesne profits and costs from the plaintiff.

If costs are awarded against several independent trespassers claiming under separate titles, there is no right of contribution between them (*Nand Lal* v. *Beni Madho*, 40 A 675, 16 ALJ 689, 47 IC 980; *Parsottam* v. *Lachmi Narayan*, 40 A 99, 20 ALJ 890, 69 IC 688).

Joint-tort-feasors: A suit for contribution by one tort-feasor, who has made a payment occasioned by the tort against another tort-feasor is maintainable. (*Kushal Rao* v. *Bapu Rao*, A 1942 Nag 52; *Dharnidhar* v. *Chandrasekhar*, A 1951 All 774 (FB); *Edra Venkatrao* v. *Edra Venkayya*, A 1943 Mad 38). The liability of joint tort-feasors is joint and several. The plaintiff can recover the whole of the damage from one of the joint-tort-feasor, who cannot insist on apportionment (*Ahsanali* v. *Kazi Syed Hifazatali*, A 1956 Nag 146; *Prasani Debi* v. *State of Haryana*, (1973) 75 PLR 811).

Co-mortgagors. As several properties mortgaged to secure one debt are, as between the owners, liable to contribute rateably to the debt secured if whole debt is realised from some property, the owner of such property has a right to call upon the owners of the other properties, to contribute rateably to the amount which he had to pay in excess of that due from his property (section 82 and 95, Transfer of Property Act). This liability of the owners of the other properties is not personal but is limited to the property mortgaged, in other words, there is a charge of the rateable mortgage money on each property and the suit for contribution must, therefore, be for the enforcement of that charge (*Ibn Hasan* v. *Brij Bhukan*, 1 ALJ 148; *Hira* v. *Palku*, 3 Pat LJ 490.). The prayer should be for sale of the property, subject to the charge, *and not for a simple money decree*. The rateable mortgage money charged on each property should be determined by the ratio of the values of the several properties *at the date of the mortgage*. The value should be the market value, *minus* the amount of any prior encumbrances to which the property was subject. The money which the plaintiff had to pay or which was realized from his property and which has to be distributed over all the properties is the legitimate mortgage money or cost of a mortgage decree or execution, but not any other money, e.g., if the plaintiff got the auction sale of his property set aside under O.21, R.89, by paying an

The plaintiff claims from the defendant a moiety of the amount paid by him to Sri Narayan and of that spent by him as costs, *i.e.*, Rs.8,600 in all, with interest from the date of suit to that of payment.

No. 35—Suit for Contribution between Co-Mortgagors

1. One Ram Lal was the owner of two houses bearing municipal numbers 25 and 26 in Katra, Allahabad.

2. The said Ram Lal hypothecated house No.25 by a bond dated January 21, 1986 to one Roshanlal.

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additional 5 per cent for the purchaser, he cannot claim contribution in respect of it (*Bhagwan Singh* v. *Md. Mazahar*, 12 ALJ 394; also see, *Subodh Chandra Das* v. *Satish Chandra Das*, 1978 ALJ 628).

If, however, one of the two mortgaged properties has been sold by the mortgagor, no suit for contribution will lie against the purchaser, if the whole mortgage money is realized from the property left with the mortgagor (section 56, Transfer of Property Act). But if the latter property had also been sold to another person, such person could claim contribution from the first purchaser (*Dih Dayal* v. *Lursaran*, 42 A 336; *Magniram* v. *Mehadi*, 31 C 102). The release by mortgagee of any part of the mortgaged property does not absolve that part of the liability from contribution under section 82 (*Shah Ram Chand* v. *Prabhu Dayal*, A 1942 PC 50).

If a part of the mortgaged property is sold subject to the mortgage, the owner of the other part has a right of contribution from the purchaser (*Rama Shankar* v. *Ghulam Husain*, 19 ALJ 584). But there is no right of contribution, as against a part of the property sold in execution of a decree on the mortgage (*Karamat Ali* v. *Gorakhpur Bank*, 44 A 488). The remaining property is liable for the whole balance of the mortgage debt (*Bhora Thakurdas* v. *Collector of Aligarh*, 32 A 612). It has been held by the judges of the Allahabad high Court (Banerji, J. dissenting) in *Ibn Husain* v. *Brij Bhukan*, 29 A 407, that no charge arises unless the whole mortgage money is satisfied by plaintiff's property and if only a portion is satisfied, no charge for the excess arises in favour of the plaintiff.

The amount to be charged on each property should be carefully worked out by the plaintiff according to the above principles, and, if the working is complicated, it should be given separately in the plaint as "Particulars of the amount claimed".

Parties : As the respective liabilities of all parties is to be determined in such a suit, once for all, all interested persons should be impleaded (*A. James* v. *Achaibar Singh*, A 1940 Pat 119, 185 IC 297.).

Limitation : A suit for contribution must be brought within three years of the payment (Article 23 or 48 of the Limitation Act 1963) or within 12 years if the charge is enforced (Article 62 of Act of 1963).

Defence : The defendant may deny his liability in toto or in part, for which the

3. By a subsequent bond dated November, 18, 1989, the said Ram Lal hypothecated both the houses No.25 and 26, to one Pran Sukh.

4. On June 20, 1990, the said Ram Lal executed, for consideration, a sale-deed in favour of the plaintiff in respect of his equity of redemption in house No.26.

5. On March 20, 1991, the defendant purchased the equity of redemption in house No.25 in execution of a simple money decree against the said Ram Lal.

6. Pran Sukh, mortgagee of both the houses Nos.25 and 26 obtained a decree No.410 of 1994 for sale of both the said houses, on foot of his bond, dated November 18, 1989, and in execution thereof, purchased house No.26 for Rs.90,000 which was the amount of his decree.

7. The plaintiff claims Rs.30,000 to be the rateable charge of the said mortgage debt of Pran Sukh on house No.25.

Particulars : The market values of houses Nos.25 and 26 on the date of Pran Sukh's mortgage were Rs.80,000 and Rs.1,00,000 respectively. As the amount of the prior charge of the said Roshanlal on house No.25 was on the date of Pran Sukh's mortgage, Rs.30,000, its contributing value was of Rs.50,000. Houses Nos.25 and 26 were, therefore, liable to contribute towards Pran Sukh's mortgage debt of Rs.90,000 in the ratio of Rs.50,000 to Rs.1,00,000, *i.e.* the proportionate charge on house No.25 was Rs.30,000.

The plaintiff claims Rs.30,000, with interest from date of suit to date of payment, or, in default, sale of the house No.25.

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decree was passed against the parties was payable by the plaintiff himself. The Calcutta High Court has held that a defendant against whom a decree for rent had been passed jointly with the plaintiff could not show that he had no interest in the tenure (*Debendra* v. *Prosonna*, 95 IC 41, A 1926 Cal 951 DB). He may plead that the plaintiff has not paid the whole decretal amount, but has obtained a reduction from the decree-holder by private settlement, or that both parties had paid the debt through the plaintiff. The mode of determining the respective liabilities of the parties adopted by the plaintiff may be attacked. Where the parties are partners, defendant may plead that the suit is not maintainable without a claim for dissolution of the partnership (*Damodara* v. *Subaraiya*, 43 IC 217 Mad), or that the claim is barred by laches (*Gattulal* v. *Gulab Singh*, 1985 (1) SCC 932).

DECREE *(j)*

No. 36—Suit for Damages for not Certifying Payment of a Decree

1. On January 20, 1992, the plaintiff paid to the defendant, and the defendant accepted the sum of Rs.1,200 in full satisfaction of the defendant's claim under decree No.520 of 1990, passed by this court and there was thus an implied agreement that the defendant would certify the payment to court and would not take out execution of the decree.

2. In spite of the aforesaid satisfaction, and in breach of the said implied agreement, the defendant put the said decree in execution and got a warrant of attachment of the plaintiff's movable property issued by this court. The plaintiff had thus to pay, and he did pay, on May 26, 1992, the sum of Rs.1,276, being the decretal amount and costs entered in the warrant of attachment.

The plaintiff claims Rs.1,276 as damages, with interest from the date of suit to that of payment.

No. 37—Suit for Refund of an Uncertified Payment

1. On January 20, 1992, the plaintiff paid Rs.800 to the defendant in part payment of the latter's decree No.520 of 1990 passed by this

(j) No uncertified payment can be recognised by the execution court and the decree must be executed in spite of any payment having been made by the judgment-debtor. The only remedy of a judgment-debtor against such a dishonest decree-holder is by a regular suit. Even if the act of the decree-holder is fraudulent, still the judgment-debtor can have no redress in the execution proceedings (*Biroo* v. *Jainurat*, 13 IC 63, 16 CWN 923).

But the suit which a judgment-debtor can bring is not one to enforce an uncertified payment (*Abdul Rahman* v. *Khoja*, 11 B 6), or for an injunction to restrain execution (*Lal Das* v. *Kishor Das*, 22 B 463). **It is a suit for breach of an implied contract to certify payment** and not to take out execution for the amount received out of court (*Krishna* v. *Savuri Muthu*, 36 MLJ 396, 42 M 338, 50 IC 584; *Gopalaswami* v. *Nammalwar*, 36 MLJ 175, 48 IC 810; *Hanmatt* v. *Sobbohat*, 23 B 394; *Ramdas* v. *Sukhdeo*, 178 IC 196). In this view, the mere fact of applying for execution would, though amounting to a breach of the contract, gives no cause of action unless any damages have accrued to the plaintiff. If he is made to pay any money or is put to any loss on execution, he can recover it. The money paid to the decree-holder and not applied by him to the purpose for which it was paid can be recovered on the ground of failure of consideration (*Genda* v. *Nihal*, 30 A 464, 5 LJ

court, and the defendant agreed to credit the money towards the said decree.

2. On June 20, 1992, the defendant applied for execution of the said decree in full, and did not give credit for the sum of Rs.800 paid to him as aforesaid.

3. The plaintiff had raised the said sum of Rs.800 by a loan from Ram Narain of Khatauli at an interest of 12 per cent per annum.

The plaintiff, therefore, claims refund of Rs.800 with Rs.40 on account of interest from the date of payment to the date of suit at 12 per cent per annum, by way of damages and further interest from the date of suit to that of payment.

No. 38—Suit for an Injunction to Restrain Execution

1. The defendant instituted a suit in this court against the plaintiff, being suit No.148 of 1995, for recovery of Rs.2,000.

2. On June 22, 1995, during the pendency of the said suit, the parties verbally agreed with each other that if the plaintiff did not contest the said suit and allowed a decree to be passed *ex parte* the defendant would accept Rs.1,800 only, in satisfaction of his whole claim, if paid within a year of the decree and would not execute his decree.

475; *C.K. Xavier* v. *Bharaaj Singh*, A 1987 Ker. 145 (DB); *Mahbub Ali* v. *M. Syed Md. Husain*, 104 IC 419 All; *Shyama Charan* v. *Chairanya*, 11 IC 1 Cal). In this view, a suit for refund of the money will lie as soon as the decree-holder puts in an application for execution without crediting the payment, *i.e.*, even before the judgment-debtor had been made to pay the money twice over. It would, however, be safer for the judgment-debtor to institute his suit only after depositing the decretal amount in the execution court, and then he can bring a suit for damages instead of one for refund, or the suit can be brought in the alternative for damages.

Limitation : Three years under Article 55 of Limitation Act, 1963 for suits for damages for breach of contract. If the suit is framed as one for failure of consideration, three years from failure under Article 47 of the Act of 1963. In order to attract Article 47 three things must be established; firstly, the suit must be for money paid by the plaintiff to the defendant; secondly, such money must have been paid upon a consideration which was in existence at the time of payment; and thirdly, the consideration should have afterwards failed (*Veerbhadra Pillai* v. *Rajeshwari Vedachalam*, (1974) 2 MLJ 398).

Defence : Defendant may plead that no damages have, occurred to the plaintiff, or that the payment was not made specifically towards the decree, hence the

3. The plaintiff did not contest the said suit and an *ex parte* decree was passed against him for Rs.2,000 and costs.

4. The defendant has, on August 20, 1995, in breach of his aforesaid agreement, put in an application for execution of the said decree and threatens to realise the whole amount of the said decree by execution proceedings.

5. The plaintiff claims an injunction restraining the defendant from executing the said decree except in case the plaintiff fails to pay the defendant Rs.1,800 within one year of the said decree.

(*For suits to set aside decree see under "Fraud" "Minor"*).

DEPOSIT *(k)*

No. 39—Suit for Recovery of Deposit

1. The defendant is a firm carrying on business at Saharanpur.

2. On April 20, 1988. the plaintiff deposited a sum of Rs.2,000 with the defendant on condition that the defendant would repay the said sum with interest at 6 per cent per annum on demand.

3. On April 19, 1995 the plaintiff demanded payment of the principal and interest due to him but the defendant did not pay the amount or any part thereof.

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defendant has appropriated it towards another debt, or that the payment was specifically made towards another debt.

An agreement anterior to the decree cannot be pleaded as a bar to the execution of a decree but a suit lies for injunction to restrain the decree-holder from executing the decree in contravention of the agreement (*Panchananda* v. *Brojendra*, 126 IC 265, A 1930 Cal 356, 34 CWN 150; *Bhaskar* v. *Nilkanth*, A 1938 Nag 265, *Coop. Bank* v. *Ram Sarup*, A 1953 Punj 267; *Mulla Ramzan* v. *Mg Po Kyaing.*, A 1926 Rang 140; *Krishnaraj Trading Corpn.* v. *Ram Saran Das*, 1962 ALJ 442). The Madras and Andhra Pradesh High Courts are of a different opinion and hold that such a pre-decree agreement can be enforced in execution (*Butchiah Chetty* v. *Tayar Rao*, A 1931 Mad 399; *Sait Hemraja* v. *Katta Subramanyam*, A 1960 AP 324).

(k) See also 'Suits for money lent', post. The test to distinguish a loan from a deposit is whether there was an obligation on the debtor to seek out the creditor and repay him (in which case it is loan) or whether he was to keep the money till the creditor asked for the same (in which case it is a deposit). This essential character of the deposit does not change even if it is for a fixed term (*Md. Akbar* v. *Attar Singh*, A 1936 PC 171; *Ram Janki Devi* v. *Juggilal Kamlapat*, A 1971 SC 255; *Mansa Ram & Sons* v. *Janki Das*, A 1984 All 267).

The plaintiff claims:

(1) Payment of Rs.2,000 principal and Rs.840 interest up to the date of suit; and

(2) interest from the date of suit to that of payment.

DOWER DEBT *(l)*

No. 40—Suit for Prompt Dower

1. The parties are Sunni Mohammedans.

2. On December 20, 1981 the plaintiff was married to the defendant and at the time of the marriage it was verbally agreed between the plaintiff and the defendant (*or*, between Sadulla, father of the plaintiff acting for the plaintiff who was then a minor and Chand Khan, father of the defendant,

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The conditions on which the deposit was made be stated. As cause of action in such cases arises from the date of demand, demand and refusal must also be alleged, and it is in this latter feature that a deposit differs from a loan (*Ghurcharan* v. *Ram Rakha*, 171 IC 506, A 1937 Lah 81, case under Article 60 of the Act of 1908; *D.B. Brijmohandas* v. *Narsinghdas*, A 1971 MP 243 case under Article 22, Limitation Act 1963). Such demand may be waived by repudiation of liability; but a defendant cannot both repudiate the liability and plead want of demand (*Nirpendra Nath* v. *Arunchandra*, A 1940 Pat 129). Article 60 was held to apply not only to a suit against a regular banker, but against every one who is, with regard to the particular transaction in suit, a banker as regards the particular plaintiff (*Motigavri* v. *Naranji*, 102 IC 408, 19 BLR 423), and when the deposit was made under an agreement that it should be payable on demand (*Ammalu* v. *Narayanam*, 111 IC 210, 51 M 549, A 1929 Mad 509; *Firm Pt. Ram Prasad* v. *Bai Rewa*, A 1970 Guj 269). When the deposit is made for a fixed period the money is payable on the expiry of that period and no demand was held to be necessary, Article 115 (and not Article 60) was held to apply to such cases (*Safema* v. *Banerji*, 164 IC 412, A 1936 Rang 338), but the Patna High Court held that in such cases the money was payable on demand after the fixed time and Article 60 was applicable (*Nokhlal* v. *Mojiban*, 182 IC 831, A 1939 Pat 261). Now Articles 60, 66 and 115 have been replaced in the Act of 1963 by Articles 22, 28 and 55 respectively.

Defence: If the defendant is not a regular banker, he may raise a question of limitation by pleading that it was a case of loan and not of deposit. A banker may plead that there was a condition of a previous notice before payment.

(l) Dower, under the Mohammedan Law, is a debt which must be paid according to agreement. The court has no power to reduce the contractual amount, except in Oudh and Ajmer-Merwara (*Mahomed Sultan* v. *Sarajuddin*, 161 IC 300, A 1936 Lah 183). A widow obtaining possession of her husband's property in lieu of dower has a lien on the property for the dower, and may retain it until the debt is

acting for the defendant who also was then a minor) that the dower debt of the plaintiff should be Rs.15,000 out of which sum Rs.5,000 should be prompt (*or*, that Rs.15,000 should be the dower debt. It was not specified what portion of the said amount was to be prompt, but the plaintiff claims that Rs.5,000 be held to be prompt), (*or*, by a *Kabinama* dated December 20, 1981, executed by the defendant at the time of his marriage with the plaintiff the defendant agreed to pay Rs.5,000 as prompt dower).

[*N.B.*- These are three precedents for separate suits based on different allegations. A plaintiff may base her suit alternatively on the express contract or on her right to have a portion of the dower adjudged as prompt. In that case, after setting out the allegations as in para 2 (without the matter within the second brackets) the plaintiff should add the following para :

"Alternatively, if it be found that there was no agreement that Rs.5,000 should be prompt, that plaintiff will ask the court to hold in the circumstances, that Rs.5,000 should be declared to be prompt."]

3. On August 22, 1982, the plaintiff demanded of the defendant payment of Rs.5,000, but the defendant refused to pay it and has not paid it or any part thereof.

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paid, but such possession must have been lawfully obtained and not adversely to the other heirs (*Isbar Fatima* v. *Anwar Fetima*, 182 IC 801, A 1939 All 348). It is immaterial whether she came in possession as creditor for dower debt or otherwise. Not only she but her heirs also can retain possession until the debt is paid (*Mt. Haliman* v. *Md. Manir*, A 1971 Pat 385). This lien is according to some High Courts, negotiable and transferable (*Cooverbai* v. *Hayatbi*, A 1943 Bom 372; *Beeju* v. *Moorthuja*, A 1920 Mad 666, 53 IC 905, 43 Mad 214 FB). The correctness of this view was doubted by Privy Council in *Mst.Mina* v. *Ch. Vakil*, A 1925 PC 63, 86 IC 579. Even in such cases, she has no charge on the property and a suit for dower is always one for a personal decree (*Kaniz Fatima* v. *Ramanandan*, 21 ALJ 269, 45 A 384; *Muniram* v. *Mukhtor*, A 1940 All 521, 1940 ALJ 789; *Zabunnissa* v. *Nazir Hasan*, A 1962 All 197), and a *bona fide* purchaser for value from the heirs gets an unassailable title (*Saiad Qasim* v. *Habibur Rahaman*, 27 ALJ 777, 31 BLR 879, 33 CWN 926, 57 MLJ 361, A 1929 PC 174), but a widow in possession can ask the court ordering execution sale of the property to declare her right to retain possession until payment of dower (*Mt. Ghafooran* v. *Ramchandra*, A 1934 All 168). In Punjab it has been held that if there are no outstanding debts, dower debt will be a charge on the husband's assets (*Mt. Nawab Begum* v. *Husain Ali*, 171 IC 831, A 1937 Lah 589). If it is against the heirs of the husband, the suit should be for recovery of the money from the assets of husband. If all the assets are in her own possession she

The plaintiff claims Rs.5,000 (*or*, Rs.5,000 or any other sum this court may hold to be reasonable as the plaintiff's prompt dower), with interest from the date of suit to that of payment.

No. 41—Suit for Dower after Dissolution of Marriage

1. The plaintiff was married to defendant (*or*, to Sadulla, the deceased father of the defendant) on June 20, 1981, and it was verbally agreed, at the time of the marriage, between Iftikhar Uddin, father and guardian of the plaintiff, acting for the plaintiff who was then a minor, and Abudulla, father and guardian of the defendant (*or*, of Sadulla), who was also then a minor, that the plaintiff's dower should be Rs.8,000 out of which half was to be prompt and half deferred.

2. The defendant divorced the plaintiff at her father's house on August 3, 1984 by uttering the words "I divorce you" three times before the plaintiff. (*or*, the said Sadulla died on August 3, 1984, and plaintiff and the defendant have since then been in possession of the whole of his property, according to their legal shares).

3. The defendant has not (*or*, the said Sadulla has not, *or*, the defendants have not) paid the said sum of Rs.8,000 or any part thereof. The plaintiff never made any demand of her prompt dower during the continuance of the marriage.

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cannot sue the heirs for dower (*Mirza* v. *Shahzadi*, 19 CWN 502). A widow in possession of her husband's property in lieu of dower cannot sell the property and if she does, the heirs can recover it without paying the debt (*Sitaram* v. *Ganesh*, 101 IC 683, 4 OWN 330).

Prompt dower can be demanded at any time after marriage and consummation is not a condition of its payment (*Husain* v. *Gulab*, 35 B 386, 11 IC 558, 13 BLR 511; *Pukhraj* v. *Hidayat*, A 1938 Pesh 72, 178 IC 182), nor does consummation of marriage debar a wife from suing for her prompt dower (*Mohammad Taqi* v. *Farmoodi*, A 1941 All 181, 195 IC 353, 1941 ALJ 118). It should be claimed within three years of the demand being refused, but, if it is not demanded and refused, it can be claimed along with the deferred dower. Some times the nature of the dower is not specified in the contract. The whole of it is then taken to be prompt under Shia Law (*Masthan* v. *Assan*, 23 M 371 PC), but under the Sunni Law, the court can declare any reasonable portion to be prompt and the rest will be deferred (*Mohammad Subban Ullah* v. *Sagbir*, 17 ALJ 625, 50 IC 740). The proportion will depend on custom, and in the absence of custom, on the status of the parties and the amount of dower (*Mangat*

4. The plaintiff has made a deduction of 1/8th of the debt from her claim, in view of the fact that she is herself owner and is in possession of her legal 1/8th share in the property of the said Sadulla and is thus liable to 1/8th share of his debts.

The plaintiff claims Rs.8,000 (*or*, Rs.7,000) with interest from the date of suit to that of payment, from the defendant (*or*, from the assets of Sadulla in the hands of the defendants).

No. 42—Suit for Dower by Wife's Heirs Against Husband's Heirs

1. On April 20, 1968, one Khuda Baksh was married to one Mt. Ilahi Jan, and, by a verbal agreement between the said Khuda Baksh and the said Mt. Ilahi Jan, it was agreed, at the time of the marriage, that the said Mt. Ilahi Jan should have deferred dower of Rs.10,000.

2. The said Khuda Baksh died on December 10, 1994, and left the defendants, who are his sons by another wife, and Mt. Ilahi Jan, widow, as his only heirs.

3. The said Mt. Ilahi Jan died intestate on January 15, 1995 leaving the plaintiff, her mother, as her only heir.

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v. *Mst. Sakina*, 141 IC 1211, A 1934 All 441; *Maimuna* v. *Sharafatulla*, 131 IC 115, 1931 ALJ 197, A 1931 All 403; *Nasiruddin* v. *Amatul Mughni*, A 1948 Lah 135, ILR 1947 Lah 565). It has been held in *Nasiruddin* (ibid) that in the absence of any evidence presumption of half and half may be raised. The court has even power to award the whole amount as prompt (*Husain Khan* v *Gulab*, 35 B 386). In Madras it has been held that the whole will be prompt even if the parties are Sunnis (*Sheikh Mohamed* v. *Ayeesha*, 1937 MWN 1077; *Masthan* v. *Assan Bibi*, ILR 23 Mad 371 FB).

A wife can base her claim on an express agreement about prompt dower and in the alternative, on Muhammedan Law, and even if she brings a suit on an express agreement she can, in the event of the finding going against her, rely on Muhammedan Law (*Mohbooban* v. *Mahomed*, 8 Pat 645, A 1929 Pat 207, Contra *Bhuri* v. *Asghari*, 94 IC 959). If the suit is brought after dissolution of marriage, this question becomes immaterial unless limitation on the ground of demand and refusal during the marriage is pleaded by the defendant. A dower can be fixed even after marriage and the amount fixed at marriage can even be varied by a post-nuptial agreement (*Fatima* v. *Laldin*, 171 IC 421, A 1937 Lah 345; *Chan Pir* v. *Fakar Shab*, A 1940 Lah 104, 189 IC 725). If a Sunni governed by Hanafi Law, divorces his wife before consummation, the wife can get only half the dower, even though the whole is prompt (*Tajbi* v. *Nattar*, A 1940 Mad 888, 1940 MWN 864). Dower under the

4. The dower debt of the said Mt. Ilahi Jan has remained unpaid.

5. Mt. Ilahi Jan was in possession of only one house (being No. 25, Cotton Street, Calcutta) out of the estate of the said Khuda Baksh, and the plaintiff is at present in possession of the said house. The whole of the rest of the estate is in the possession of the defendants. The plaintiff offers to surrender possession of the said house.

Mohammedan Law is an obligation imposed upon husband as a mark of respect for his wife. The right to claim prompt dower precedes cohabitation. The wife can refuse to live with husband and permit him to have sexual intercourse so long as prompt dower remains unpaid (*Nasra Begum* v. *Rajwan Ali*, 1979 AWC 722).

In a suit for dower, **it should be stated when and how the amount was fixed, whether before, or after, or at the time of marriage, and whether with the husband himself or his guardian. It should also be stated whether the dower was prompt or deferred.** If prompt dower is claimed, a demand and refusal must be alleged as that is a part of the cause of action (*Rance* v. *Rance*, 2 IA 235; *Musammat Muluka* v. *Musammat Jameela* , 11 Beng LR 375). A previous demand is not necessary if the amount of prompt dower is unascertained (*Mohammad Taqi* v. *Farmoodi* A 1941 All 181, 105 IC 353, DB; *Bibi Rehana* v. *Iqtidar*, A 1943 All 184 DB).

If there was no specification in the contract, and the plaintiff claims a portion as prompt, the fact should be stated and it should be alleged that the parties are Sunnis. If the suit is brought after the dissolution of marriage, the date of dissolution should be given, and if any portion of the dower was prompt, it must be alleged that it was not demanded during the continuance of the marriage, or that it was demanded and refused within three years before the suit. Proper dower to be fixed by the court can be claimed even if there was no contract for a dower. If there is no satisfactory evidence of dower, the court will be justified in awarding *Sharai* dower only (*Iftikhar* v. *Sharif Jehan*, 102 IC 838, 4 OWN 150, A 1927 Oudh 194). The amount of dower cannot be less than 10 dirams, (*Asma* v. *Abdul Samad*, 32 A 167). In any case, it is not necessary to allege the social status of the parties or the amount of dower of other members of the family of the wife, as they are mere evidence.

Heirs or legal representatives of wife can bring suit for recovery of dower debt after the death of wife (*Mohd. Janudul Haque* v. *Mohd. Zubair Haider*, A 1981 Patna 345). When a wife's heirs after her death brings a suit against the husband, reduction must be made in proportion to the husband's legal share as one of the heirs of his wife. When a claim is brought after the death of the husband there should be a reduction in proportion to the share of assets inherited by, and in possession of, the widow. If there is an apprehension of other creditors of the husband taking away the property in plaintiff's hands as assets of the husband, it is preferable to claim a decree against the whole assets, as, otherwise the plaintiff may be deprived of her share of property and also a part of her dower debt.

If a widow is in possession of an undistributed portion of her husband's estate, she can still sue the other heirs in possession of the remainder provided she

The plaintiff claims a decree for Rs.10,000 and interest from date of suit to that of payment against the entire estate of Khuda Baksh in the hands of the parties to be realised in any way the court directs. (*or*, the plaintiff claims that an account may be taken of the property of the said Khuda Baksh, deceased, and that the same may be administered under the decree of court).

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offers to surrender possession of the portion which is in her possession (*Ghulam* v. *Sagir-un-nissa*, 23 A 432), or she may bring an administration suit. In the former case also, the suit really assumes the character of an administration suit. The nature of such a suit and how it should be tried has been duly explained in *Mirza* v. *Shahzadi*, 19 CWN 502. In an administration suit the widow can also ask for partition of the residue of the estate amongst all the heirs (*Amir Bi* v. *Abdul Rahim*, 110 IC 276, A 1928 Mad 760, 55 MLJ 266). In taking accounts of the profits of property in the hands of the plaintiff, the latter is entitled to have reasonable interest on the dower debt, which may ordinarily be 12 per cent per annum, set off against the profits (*Mirza* v. *Shahzadi*, 19 CWN 502; *Hamira* v. *Zubeda*, 38 A 581 PC). Interest from date of suit to that of realisation may be awarded (*Mamuna* v. *Sharafatulla*, 1931 ALJ 197, 131 IC 115, A 1931 All 403). The heirs of a Muslim dying intestate succeed to the estate of the deceased as tenants-in- common. They are liable to the extent of the shares they inherit in the estate of the deceased (*P.N. Veetil Narayani* v. *Pathummal Beevi*, A 1991 SC 720).

Limitation : Under the Act of 1908 was three years and ran in the case of prompt dower from the time when the dower was demanded and refused or, when no demand had been made during the continuance of marriage, from the time when the marriage was dissolved (Article 103) and, in the case of deferred dower, from the date of dissolution of marriage (Article 104), or if a time was fixed for payment, then from the expiry of that time (*Sarb Krishan* v. *Mt. Fatima*, A 1937 Lah 859). If the contract was by a registered instrument, the limitation was extended to six years (*Asiatulla* v. *Danes Md.*, 50 C 253). Under the Act of 1963 all such suits will be governed by the residuary Article 113, and the limitation would be three years from the date when the right to sue accrues. Dissolution once made gives a cause of action which cannot be renewed if after divorce the parties again live as husband and wife and subsequently the husband again divorces the wife (*Mt. Hayat Khatun* v. *Abdullah Khan*, A 1937 Lah 270). When demand and refusal were made, not on one date but on different dates, limitation runs from the date of refusal (*Razina* v. *Abida*, 1936 ALJ 1328, 1939 AWR 1049; also see, *Ahmadi Bibi* v. *Md. Mabood*, A 1979 All 37).

Defence: In addition to the usual plea disputing the amount of dower in all cases, the defendant may, in a suit for prompt dower, plead that no portion, or a very small portion, was agreed to be prompt. In other suits, it may be pleaded that a substantial portion was prompt, and that the same had been demanded and refused more than three years before the suit and claim for it is time-barred. The defendant

GUARANTEE *(m)*

No. 43—Claim on Guarantee of a Debt

1. On January 14, 1994, one Ram Ratan was indebted to the plaintiff in the sum of Rs. 4,640 on account of rent of a house.

2. On the said date, by a guarantee in writing and in consideration that the plaintiff would give time to the said Ram Ratan for payment of his said debt and would forbear from suing the said Ram Ratan for the said debt until May 14, 1994, the defendant agreed to pay to the plaintiff the said Rs.4,640 on May 14,1994, if the said Ram Ratan failed to do so.

3. The plaintiff gave time to the said Ram Ratan and forbore to sue him. The said Ram Ratan failed to pay the said sum on the said day and the same is still unpaid.

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may plead that the widow has been in possession of the estate of the husband in lieu of dower debt and must account for the profits. He may plead that the wife had relinquished her dower debt in consideration of obtaining a divorce from the husband. But no relinquishment is valid unless the woman was at the time major not according to the Muslim Law but according to the Majority Act (*Nejumnissa* v. *Sirajuddin*, 17 Pat 303, 1938 PWN 144; *Abidhunnisa* v. *Md. Fathi*, 35 MLJ 648). The Allahabad and the Calcutta High Courts have taken a contrary view (*Qasim* v. *Kaniz Sakina*, A 1932 All 649 ; *Mazharulal* v. *Abdul Ghani*, A 1925 Cal 322). But the minority of the husband cannot be pleaded against his contract of dower, for section 2 of the Indian Majority Act does not affect the capacity of any person to make a contract for dower (*Sayab* v. *Bibi Khathoo*, 29 IC 587; *Mazharulal* v. *Abdul Ghani*, A 1925 Cal 322).

(m) See sections 124 to 147 Contract Act. For difference between *Guarantee* and *Indemnity* see *Ramchandra* v. *Shapurji*, A 1940 Bom 315. Briefly speaking, a contract of guarantee differs from that of indemnity in that it implies the existence of three parties and that it is entered into for the security of the creditor and not for the reimbursement of a loss. The guarantee should be a definite undertaking to indemnify and the mere saying by A that B may safely do business with C will not constitute A surety for C (*Mahommed Shamsudin* v. *Shaw Wallace and Co.*, 184 IC 153, A 1939 Mad 520). A person sought to be made liable as surety should undertake to perform the promise or discharge the liability of third party in case of his default (*Bitton Bibi* v. *Kuntee Lal*, A 1952 All 996) The surety may be sued separately or along with the principal and the decretal amount can be realised against the surety alone in the first instance in execution proceedings if there is a decree against both the debtor and the surety (*Bank of Bihar* v. *Damodar Prasad*, A 1969 SC 297; *State Bank of India* v. *Indexport Registered*, A 1992 SC 1740). **The contract of guarantee must be alleged as any other contract. Then the facts showing the default of the principal should be alleged.**

The plaintiff claims Rs.4,640 with interest from May 14, 1994 at the rate of 1 per cent per mensem upto date and further interest upto the date of payment.

No. 44—Suit Against Surety for Payment of Rent

(Form No. 12, Appendix A, C. P. C.)

1. On the ___ day of _____19__, EF hired from the plaintiff, for the term of _____ years, the house No._____, _____ Street), at the annual rent of _____ rupees payable (monthly).

2. The defendant agreed, in consideration of the letting of the premises to EF, to guarantee the punctual payment of the rent.

3. The rent for the month of_____19__, amounting to _____ rupees, has not been paid.

[*If by the terms of the agreement, notice is required to be given to the surety, add*--]

The liability of a surety being co-extensive with that of the principal, the plaintiff can, in the absence of a clear intention to the contrary, sue either of them without suing the other (*Depak Datt* v. *Secy. of State*, 118 IC 429), and it is not necessary that the creditor should exhaust all remedies against the debtor or should give notice of the principal's default to the surety (*Sankanna* v. *Virupakshappa*, 7 B 146; *Nagpur Nagrik Sahakari Bank Ltd.* v. *Union of India*, A 1981 AP 153); nor is it necessary to make a demand upon the principal before proceeding against the surety, unless such notice is stipulated in the contract (*Walton* v. *Mascall*, 1844 M & W 452). Where the contract provided that if the mortgage money could not be realised from mortgage property, mortgagee may realise it from the surety, it was held that the mortgagee could not proceed against the surety without first proceeding against the mortgaged property, and accordingly, time begins to run against the surety when the mortgagee fails to recover the whole money from the mortgaged property (*Daljit* v. *Har Kishan*, A 1940 All 116, 187 IC 152). A contract of guarantee cannot be enforced beyond the time provided in its terms (*State of Maharashtra* v. *M. N. Kaul*, A 1967 SC 1634). If the guarantee is for a limited amount only, the limit must be specified in the plaint as the surety cannot be made liable for more.

A bank guarantee is not extinguished even if the principal debtor company goes into liquidation (*Maharashtra S. E. Bd.* v. *Official Liquidator*, A 1982 SC 358). A bank guarantee stands independent of any claim or counter claim between the contracting parties and its enforcement cannot be prevented on any ground of alleged claim by the party on whose behalf the bank guarantee was given against the party in whose favour it was given (*National Project Construction Corp.* v. *G. Ranjan*, (1985) 98 CWN 186- case law discussed). A bank giving an irrevocable

4. On the ____ day of _____19__, the plaintiff gave notice to the defendant of the non payment of the rent, and demanded payment thereof.

5. The defendant has not paid the same.

No. 45—Suit Against Principal as well as Surety for Price of Goods

1. On January 4, 1995, the defendant No.1 verbally agreed that if the plaintiff supplied any goods upto a limit of Rs.16,000 to defendant No.2 on credit, defendant No.1 would be responsible to the plaintiff for the due payment of their price.

2. The plaintiff accordingly supplied to defendant No.2 the goods worth Rs. 5,900 from January 4, 1995 to January 31, 1995.

Particulars:

Date	*Goods Supplied*	*Price*
*	*	*

3. The plaintiff sent his bill to defendant No. 2 and a copy of the same to defendant No.1 on February 1, 1995, and intimated in that bill that if the same was not paid within one week of presentation, the plaintiff would charge interest at 1 per cent per mensem.

4. Neither of the defendants has paid the plaintiff the said sum of Rs. 5,900 or any part thereof.

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unconditional guarantee to pay upon the demand of the party in whose favour it is given cannot question the demand on the ground that the occasion for invoking the guarantee had not arisen (*Vinay Engineering* v. *Neyveli Lignite Corpn.*, A 1985 Mad 213; *D.T.H. Construction* v. *S.A.I.L.*, A 1986 Cal 31). But this does not bar a suit or application against the party which is seeking to invoke the bank guarantee to restrain it by injunction from doing so (*Union of India* v. *Meena Steels Ltd.*, A 1985 All 282 DB).

Limitation : The question as to when the time begins to run against the surety has to be decided on the terms of the contract of guarantee in each case. Where the contract of guarantee is clear that the creditor must first proceed against the principal debtor and that only when he fails to realise the whole amount due from the principal debtor, he is to proceed against the surety, the time begins to run against the surety only from the date when the creditor fails to realise the amount (*Daljit Singh* v. *Harikrishnan Lal*, 1940 All 116). The liability of the surety may be kept alive by his making payments towards the debt or his acknowledgment of

The plaintiff claims:

(1) Rs.5,900, with Rs.350 as interest from February 8, 1995 to date of suit.

(2) Further interest from date of suit to that of payment.

(For precedents of suit on security bonds see under "Bonds" and for interest, see precedents and note under (r), post)

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liability. But any payment made by the principal debtor will not start a fresh period of limitation against the surety, the reason being that the relation of principal and surety does not give rise to an implied authority on the part of the principal debtor to make payment on behalf of the surety (*Kobal Dalji* v. *Kobal Sonu*, 28 Bom 248). The fact that the payment by the principal debtor was made with the knowledge and consent of the surety and even at his request makes no difference (*Brajendra Kishore* v. *Hindustan Cooperative Insurance Society*, 44 Cal 978). For the same reason an acknowledgment by the principal debtor cannot extend the limitation against the surety (*Dialu* v. *Nand*, 13 Lah 240, A 1931 Cal 691).

Defence: The surety can plead any fact making the guarantee invalid, e.g., misrepresentation concerning a material part of the transaction or concealment of a material circumstance (sections 142 and 143). He may plead that he has been discharged by any act or conduct of the plaintiff. Such act or conduct should be specifically alleged and it is not sufficient merely to say that he has been discharged. Acts and conduct which operate as a discharge of surety are laid down in sections 133 to 139 and 141, Contract Act. An unauthorised material alteration by promisee whether by adding anything to or by striking out anything from a written contract avoids the contract against the surety. In a document of guarantee, if the blank spaces relating to the amount for which the person stands as surety and the rate of interest are filled up without his consent, such filling up amounts to material alteration and discharges the surety (*S. Perumal Reddiar* v. *Bank of Baroda*, A 1981 Mad 180). If the employer of a servant whose fidelity has been guaranteed, continues to employ him even after a proved act of dishonesty without notice to guarantor, the surety is discharged (*Radha Kant Pal* v. *United Bank*, A 1955 Cal 217). It is well settled that a surety is not discharged by the discharge of the principal debtor by operation of law such as of the provisions of the Madras Agricultural Relief Act or the Insolvency Act. (*Jaganath* v. *Shivanarayan*, A 1940 Bom 247; *The Nellore Cooperative Urban Bank* v. *Mallikarjunayya*, 1947 II MLJ 487; *Subramaniam* v. *Chinnamuthu*, A 1942 Mad 145). The creditor's omission to sue debtor within the period of limitation does not operate as discharge of the surety (*Sankana* v. *Virupakshap*, 7 B 146; *Krishto Kishore* v. *Radhe Raman*, 12 C 330; *Subramania* v. *Gopala*, 33 M 350; *Narain Das* v. *Nanu*, 116 IC 421, A 1929 Nag 145).

(n) **An heir is not personally liable for the debts of his ancestor,** not even a Hindu son (*Lalta* v. *Gajadhar*, 1933 ALJ 550, A 1933 All 235; *Baijnath* v. *Banwari*, 134 IC 160, 12 Pat 961). Ordinarily the assets of the debtor are liable and the plaintiff

HEIR *(n)*

No. 46—Suit on a Bond Against the Executant's son who was Member of a Joint Hindu Family

1. The defendant is the son of Ramadhin deceased and was a member of a joint Hindu family with the said Ramadhin at the time of the latter's death. The said Ramadhin died on August 8, 1993, and defendant is in possession of the property of the said joint family.

2. On January 2, 1992, the said Ramadhin borrowed Rs.2,500 from the plaintiff, and in consideration of the loan, executed a bond agreeing to pay Rs.2,500 on demand, with interest at 12 per cent per annum with half-yearly rests.

The plaintiff claims a decree for Rs. _____ as per account given below, with interest from date of suit to that of payment against the joint family property of the defendant and the said Ramadhin in the defendant's hands.

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should claim a decree not against the heir but against the assets of his debtor in the hands of the heir. It is not necessary to specify the assets or to prove them, if a legal heir is sued (*Shanker Lal* v. *Abdul Rahman*, 20 IC 407 Nag; *Shanker Lal* v. *Ganesh Singh*, A 1929 Nag 170, 89 IC 236; *Rajaram* v. *Nathu*, 120 IC 333 Nag). It has, however, been held that if it is proved that the defendant has not received any assets, the suit must be dismissed (*Tara Chand* v. *Dharman*, 1936 AWR 32). The plaintiff should allege in the plaint and prove, if it is not admitted, that the defendant came into possession of any property of the deceased before any decree can be passed (*Bhagmal* v. *Garimju Mal*, 83 IC 810, A 1923 Lah 471 DB).

If any person, who is not a legal heir, is sued on the ground that he is in possession of the assets, the plaintiff must allege and prove that the defendant is in possession of any assets of the debtor and is, therefore, a legal representative, otherwise no decree can be passed. Even in cases where the assets are in possession of an intermeddler, it is safer to join the legal heir also as a defendant with the intermeddler. The risk of not joining the legal heir is well illustrated in *A. Narasimaiah* v. *Jawantharaj*, 101 IC 110, 52 MLJ 229, where both were sued but the plaintiff exempted the real heir and obtained a decree against the intermeddler who was in possession of the assets. Afterwards the real heir sued the intermeddler and obtained possession, and the plaintiff decree-holder could not follow the property in the hands of the real heir as the latter had been exempted from the decree. A decree against a supposed heir is not binding on the real heir (*Angad* v. *Neelana*, 93 IC 625 Mad). But if a plaintiff, without any fraud or collusion, sues a person who would ordinarily be the legal representative in ignorance of

No. 47—Like Suit Against a Son who was not a Member of Joint Family, and Against Another not Heir

1. The defendant No.1 is the son of Ramadhin deceased, and defendant No.2 is the widow of Sheo Prasad, a predeceased son of the said Ramadhin.

2. *As in the last precedent.*

3. The said Ramadhin died on August 8, 1993.

4. On the death of the said Ramadhin, the defendant No.2 has got her name entered in the municipal assessment register on a half share in house No.812 situated in Shivaji Marg, Lucknow and left by Ramadhin, and she is in possession of the said half share.

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circumstances, making another person the legal representative, then the decree obtained against the former will be binding on the latter (*Pulikku* v. *Thappaili*, 108 IC 409, A 1928 Mad 243 DB). In certain circumstances persons wrongly impleaded as legal representative have been held to represent the estate and the decree has been held to be binding on the true representatives when the plaintiff acted *bona fide* (*Mt. Chandri* v. *Hira Lal*, A 1933 Rang 73, 144 IC 663; *Jogeshwar Dass* v. *Sundar Shau*, (1973) 1 CWR 166), but in all such suits plaintiff must be diligent to find out and implead all the representatives (*Mt. Karan* v. *Matwal*, A 1933 Lah 380, 141 IC 580). Where only some heirs of deceased defendant are made party after *bonafide* enquiry made by the plaintiff the estate of the deceased is sufficiently represented and the decree would bind all the heirs (*Khaja Begum* v. *Khaja Mohuddin*, (1975) 2 APLJ 79, 1975 An LT 973).

Where a person takes possession of the estate of the deceased and appropriates or disposes it, he is an intermeddler and a decree can be passed against him as legal representative, and if the property of the deceased is not forthcoming in execution proceedings, the decree can be executed personally against him to the extent of the value of the property which has come to his possession (section 52(2), C.P.C.).

The Allahabad High Court took a very strict view and held that when the deceased was a member of a joint Hindu family with his son, his creditor could not obtain any kind of decree against a separated brother who had appropriated the deceased's crops (*Lachmi Chand* v. *Suraja*, 103 IC 338). It was held that the family being joint, there were no estate of the deceased with which the brother could intermeddle, until decree was passed which alone could make it an asset of the father under section 53 C.P.C.

If the defendant was a member of a joint Hindu family with the debtor at the time of the latter's death, he can be sued if the deceased had any separate property

The plaintiff claims decree for Rs.____ as per account given below with interest from the date of suit to that of payment against the assets of the said Ramadhin in the hands of the defendants.

No. 48—Like Suit Against a Member of a joint Hindu Family not being the son, when the Executant had no Separate Property

1. The defendant No.1 is the brother and defendant No.2 is the nephew of one Ramadhin.

2. The said Ramadhin died on August 8,1993 and was, at the time of his death, a member of a joint Hindu family with the defendants, and was the karta and manager of the said family. The defendants are in possession of the property of the said family.

3. *Same as para 2 of Precedent No.46.*

4. The said Ramadhin had taken the said loan for the expenses of the marriage of his daughter Km Raj Kali.

The plaintiff claims decree for Rs.____ as per account given below

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and the defendant is his legal heir or is in possession of the assets. But the joint family property will not be liable unless— (1) the defendant who is in possession of the property is the son, or (2) the debtor was the manager of the family *and* the debt was contracted for the benefit of the family. If the defendant is the son, the plaintiff need not allege the necessity for the loan, as the defendant cannot contest his liability to pay the debt from the joint family property unless he alleges and proves that the debt was illegal or immoral. In any other case, the plaintiff must allege that the debtor was a member of a joint Hindu family and was its manager, and must also allege the legal necessity for loan.

Defence usually is a denial of the debt. This may be coupled with plea of discharge in the alternative, as this inconsistency is permissible to defendant because he is a stranger to the transaction. If he was a member of a joint Hindu family with the debtor and was not the latter's son and the plaintiff has not alleged in the plaint that the debtor was the manager or that the debt was taken for family necessity, the defendant should simply plead that on the plaintiff's own showing the family property is not liable. If the defendant is debtor's son, he may plead that the debt was illegal or immoral, but a mere plea that it was not taken for family necessity is not available to him. If an heir is sued on the allegation that he is in possession of assets, but really he has no assets, it is best to make a statement to that effect, although this would not prevent a decree being passed and cannot, therefore, be taken as plea in defence.

with interest from date of suit to that of payment against the joint family property of the time of the said Ramadhin in the hands of the defendants.

HIRE *(o)*

No. 49—Suit for Hire and for Damages for Breach of Agreement

1. By a verbal agreement between the parties on December 10, 1993 the plaintiff let certain articles of furniture and other goods on hire to the defendant for 16 days at Rs.500 and the defendant undertook to use them in a careful and reasonable manner during the continuance of such hiring, and to redeliver the same at the expiry of the term of hire to the plaintiff in as good a state and condition as they were, when let to him, subject to reasonable wear and tear incidental to such use.

2. The defendant used the said goods in so negligent and careless manner that they were greatly damaged and deteriorated otherwise than by reasonable wear and tear.

Particulars

(o) [On other forms of Bailment, see PLEDGE, RAILWAYS AND CARRIERS]. The position of a hirer of goods is that of a bailee, and he should take the same care as a man of ordinary prudence may be expected to take of his own goods of the same bulk, quality and value vide section 151, Contract Act (*Shantilal* v. *Tarachand*, A 1933 All 158, 142 IC 691). He can be sued for damages owing to his negligence or carelessness. In a suit for such damages or for hire money, **the agreement must be pleaded, and the terms, breach of which has been made by the defendant, must be pleaded with the exact nature of the breach.** If the breach pleaded is a statutory duty, the duty need not be pleaded as that would be pleading law. **It should be sufficient to plead the breach only.** Particulars of the damages claimed must be given.

Limitation : A suit for compensation for damage to the articles was held to be governed by Article 115 and not 36 of the Limitation Act, 1908 (Holloway v. Holland, A 1933 Oudh 518, 145 IC 1001). Under the Limitation Act of 1963, such a suit would be governed by Article 91 (b) or 55.

Defence : It is useless to deny the terms of the hire, if they are not extraordinary. The defendant may plead that the damage was caused by *vis major*, or that he had taken as much care of the goods, as a man of ordinary prudence would, under similar circumstances, take of his own goods, and that the damage was caused by pure accident or that the defects pointed out by the plaintiff existed at the time of hiring the goods.

(a) A hole was burnt in the middle of the green carpet thereby rendering it of no value. The carpet when delivered to the defendant was of the value of Rs.1,000.

(b) The glass stand of the big lamp was broken and will cost Rs.100 to repair.

(c) The velvet cushion was spoiled and rendered of no value by having kerosene oil spilt over it. When delivered to the defendant, it was of the value of Rs.400.

3. The defendant has not paid the hire money, or any part thereof.

The plaintiff, therefore, claims:

(1) Rs.500 on account of hire money.

(2) Rs.1,500 damages.

(3) Interest from date of suit to date of payment.

INDEMNITY *(p)*

No. 50—Suit on an Express Indemnity

1. On November 20, 1991, the defendant sold a house to the plaintiff representing that there was no encumbrance on it, and that the one originally created in favour of Ram Chandra had been discharged. By the sale-deed executed by the defendant the same day, the defendant covenanted that if any prior encumbrance was claimed by any one and the plaintiff had to pay anything on account of any such prior charge, the defendant should indemnify him against such loss.

2. The said Ram Chandra instituted in this Court a suit on the basis of his prior hypothecation bond, and on September 23, 1993, obtained a decree for sale of the said house.

(p) See Section 124, Contract Act. [*Also see* Guarantee *(m) ante*, for difference between guarantee and indemnity]. The contract may be express or implied. As to what damages a promisee can recover, *see* section 125, Contract Act. In a suit for damages for breach of contract of indemnity, **the contract must be alleged with details as to whether it was express or implied, whether it was oral or in writing; its terms, the breach of which is the cause of action for the suit, with the breach there of. should also be alleged, and then the damages with particulars.** A contract by an accused to indemnify his surety is not enforceable (*Prasanno Kumar* v.

3. The plaintiff had thus to pay, and he has in fact paid on January 26, 1994, Rs.23,500 in full discharge of the decree of the said Ram Chandra.

4. The defendant has not indemnified the plaintiff against the loss thus sustained by him.

The plaintiff claims Rs.23,500, with interest from the date of suit to that of payment.

No. 51—Ditto

(Form No. 20, Appendix A, C. P. C.)

1. On the ___ day of _____19__, the plaintiff and defendant, being partners in trade under the style of *AB* and *CD, dissolved* the partnership, and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the firm.

2. The plaintiff duly performed all the conditions of the agreement on his part.

Prakash, 19 CWN 329). A purchaser subject to encumbrances impliedly agree to indemnify the seller against the encumbrances (*Rama* v. *Venkatalingam*,1933 MWN 486). Ordinarily cause of action for a suit for breach of contract of indemnity arises when the plaintiff has suffered damages by actual payment. It has however been held that the passing of a decree against the plaintiff was sufficient to give him a cause of action (*Chiranjilal* v. *Naraini*, 41 A 395, 17 ALJ 394, 51 IC 158). The question whether a new cause of action would accrue after the decree is realised and the plaintiff is actually indemnified was left open. If a purchaser undertakes to discharge an earlier encumbrance but fails to do so, the vendor has two alternative causes of action. He can, before suffering any actual damage, bring an action to have himself put in a position to meet the liability which the purchaser has failed to discharge. He can also if, as a result of that failure, he has already incurred loss, claim the amount of loss by enforcing the contract of indemnity (*Lala Shanti Saroop* v. *Janak Singh*, 1957 ALJ 875 FB). In a Madras case a debt of a mortgagee due from certain co-sharers was, on partition, divided between them in certain proportions and an indemnity deed was executed under which each agreed to indemnify the other against the liability imposed on him. The mortgagee threatened to sell plaintiff's property for realisation of the whole debt and defendants on being called upon by plaintiff did not pay the share due from them. On plaintiff's suit the plea of the defendants, that the suit was not maintainable as plaintiff has not yet suffered any damage was not accepted (*Ghulam* v. *Mohammad Ali*, A 1943 Mad 360). In a case

3. On the ____ day of _____19___, (a judgment was recovered against the plaintiff and defendant by *EF*, in the High Court of judicature at ___, upon a debt due from the firm to *EF* and on the ___day of ___19 ___), the plaintiff paid Rs.____(in satisfaction of the same).

4. The defendant has not paid the same to the plaintiff.

No. 52—Suit on an Implied Indemnity

1. The plaintiff sold shop No. 85 situated in Mohannagar, Lucknow, to the defendant by a sale-deed, dated July 15, 1991, and out of the consideration, left Rs.22,000 with the defendant, directing him by the said sale-deed to pay the same to one Ram Chandra, on account of principal and interest up to date, due to the said Ram Chandra from the plaintiff under a mortgage bond, and to obtain by such payment redemption of the mortgage for the plaintiff. The defendant accepted the sale-deed on the aforesaid terms and took possession of the property sold to him.

2. The defendant did not pay the said Rs.22,000 or any part thereof to the said Ram Chandra, though the plaintiff asked him by a registered notice dated September 20, 1992 to do so.

3. The said Ram Chandra obtained a decree on foot of the mortgage against the plaintiff and the plaintiff had to pay, and he did pay on June 4, 1995, to the said Ram Chandra, a sum of Rs. 24,543 on account of the debt and costs due under the decree.

4. The defendant has not indemnified the plaintiff against the loss thus sustained.

The plaintiff claims Rs.24,543 and interest from date of suit to that of payment.

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like the one in precedent No. 52 when no time is fixed in the contract for payment, the undertaking should be taken to be to pay on demand either by the promisee or by the person to whom payment is to be made. Therefore, such a demand is necessary to complete the cause of action and should be made and alleged in the plaint.

Limitation : Under the Act of 1908, the suit would be governed by Article 116 or 115 (*Lala Shanti Saroop* v. *Janak Singh*, 1957 ALJ 875). Under the Act of 1963, the limitation will be three years under Article 55 or 113.

Defence : The defendant may plead any facts showing that he had been excused by the plaintiff, or was prevented by the plaintiff's own misrepresentations, from performing his contract. For instance, he may show that the money left with

INJUNCTION *(q)*

No. 53— Suit for prohibitory Injunction to Restrain Breach of Contract

1. The plaintiff let plots Nos.142 and 678 in village_____ to the defendant, by a deed of lease, dated July 6, 1990, for purposes of a nursery for 7 years, and the defendant agreed by the said deed of lease not to use the land for any other purpose.

2. The defendant has, since July 1, 1993 commenced to dig earth from the said plots for the purposes of his adjoining brick-kiln.

3. The defendant threatens and intends, unless restrained from so doing, to continue to dig earth from the a said plot.

The plaintiff claims a perpetual injunction restraining the defendant, his servants, or agents, from digging earth from any portion of the said plots Nos.142 and 678.

No. 54—Suit for an Injunction Restraining Waste

(Form No. 35 of Appendix A, C.P.C.)

1. The plaintiff is the absolute owner of *(describe the property)*.

2. The defendant is in possession of the same under a lease from the plaintiff.

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him for a prior mortgage was insufficient and the mortgagee would not accept part payment, or that the plaintiff had asked him to make the payment in his presence but did not afterwards turn up.

(q) Injunctions which are necessary to prevent breach of a contract are dealt with here. Those necessary to prevent tort will be dealt with under plaints arising out of tort (e.g., Copyright, Easement, Nuisance). A negative contract, *i.e.*, an agreement not to do a certain act, is enforced by an injunction, which is either prohibitory or mandatory. Prohibitory injunction is necessary in such cases to ~~prevent multiplicity of suits. The plaint should allege the contract, and particularly~~ **the terms of the negative contract, breach of which is complained of, with the act of breach.** It should also be alleged **that the defendant threatens and intends to repeat the breach of contract complained of.** Circumstances from which such intention can be inferred should not be alleged as that would be pleading evidence. For instance, in the case of precedent No. 55 it would be tempting to plead that the defendant has prepared a plan of the building he wants to build on the plot, that he has filed that plan in the office of the Municipal Board, that he has obtained the Board's permission to build the house, and that he has given a contract for the building, but all these

3. The defendant has cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale, without the consent of plaintiff.

4. The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

No. 55—Like Suit for Mandatory and Prohibitory Injunction

1. By a lease, dated January 20, 1991, the plaintiff let a plot of land lying to the west of his residential house in Mohalla Bisati, Bareilly, to the defendant, for 10 years for the purpose of using it for storing timber. The defendant executed a *kabuliat* on the same date, accepting all the terms of the lease and expressly agreeing not to use the land for any other purpose.

2. In the month of April, 1995, the defendant commenced to erect a house on the said land and has already constructed one room in the western portion of the plot.

3. The defendant further intends and threatens to cover the whole plot by other buildings, unless restrained from doing so.

The plaintiff claims :

(1) An order that the defendant pull down and remove the building which he has already erected on the said plot.

(2) A perpetual injunction restraining the defendant from erecting any other building on the said plot.

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facts are only evidence of the defendant's intention and threat.

A prayer for injunction may be added to a suit for possession or damages, when there is a proper case for an injunction. This should be avoided unless the plaintiff can make out case for an injunction. When he claims it, he must disclose facts entitling him to it. There must be imminent danger, and the damage apprehended must be substantial. The fact that a plaintiff instituted the suit on the last date of limitation was itself regarded in a case as negativing an imminent danger (*Nathu* v. *Sheosa*, A 1926 Nag 25). Before a mandatory injunction is granted there should be an obligation on the defendant to perform the act. If a man trespasses on A's land and plants trees, the remedy of A is to sue for possession of land and not for removal of trees (*Ewin* v. *U. Po*, 104 IC 139, 5 R 404).

Under sections 38 and 39 of Specific Relief Act 1963, the plaintiff may pray for a perpetual or mandatory injunction to prevent the breach of an obligation existing in his favour. Where there is no obligation, contractual or otherwise on the

INTEREST *(r)*

No. 56—Claim for Contractual Interest

The defendant had at the time of taking the furniture on hire agreed by contract dated April 2, 1994 (*or*, verbally agreed) to pay interest on the amounts remaining unpaid after the tenth of every month at the rate of 15 per cent per annum.

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part of the defendant towards the plaintiff, the plaintiff is not entitled to a mandatory or perpetual injunction (*Raman Hosiery Factory* v. *J.K.Synthetics Ltd.*, A 1974 Delhi 207).

Limitation : Three years under Article 113, Limitation Act, 1963. In some cases section 22, Limitation Act, 1963 will be of much help, but unreasonable delay may be fatal as the relief is discretionary (*Mt. Bhagwati* v. *Mohan Singh*, A 1934 Lah 147).

Court-fees : Valuation for both court-fee and jurisdiction purposes is that put upon his claim by the plaintiff himself. This is arbitrary. *See* also State amendments.

Defence : The defendant may plead that the breach is not a substantial one (*Shiam Sunder Sharma* v. *Ganga Prasad*, 5 DLR (All) 329), that it was only temporary, and, in case of prohibitory injunction, that he does not intend to do the act apprehended, or that he did all the acts complained of with the prior permission, express or implied, of the plaintiff. If the facts are such that he can show that he entertained a *bona fide* belief that he had a right to make the construction, he can plead acquiescence of the plaintiff in the acts complained of. (For the exact requirements of this plea, *see Chapter* XIV).

(r) The law relating to interest has been considerably simplified by the enactment of the Interest Act 1978 on the recommendations of the Law Commission of India. It replaces the Interest Act 1839. There had been a number of conflicting decisions on the interpretation of various provisions of the repealed Act. Those decisions need not, therefore, be referred to except in respect of meaning of expressions repeated in the new Act, which is much more comprehensive. Earlier, interest was not payable on unliquidated damages either for breach of contract or of tort even if a notice of demand was served under the Interest Act; now it is claimable under section 3 (1)(b). Under the Old Act the power to award interest under any agreement or any enactment or other rule of law or usage was saved. It has been saved now too by sections 3(3)(a) and 4(1); it has further been clarified in section 4(2) that in the following cases interest shall be allowed unless the court is satisfied that there are special reasons why it should not be allowed:—

(a) where money or other property has been deposited as security for the performance of an obligation imposed by law or contract from the date of the deposit;

(b) where the obligation to pay money or restore any property arises by virtue of a fiduciary relationship from the date of the cause of action;

No. 57—Claim for Customary Interest

It is a custom in the grain market at Shamli that on such transactions as aforesaid an interest of 15 (fifteen) per cent per annum is payable by the party in default.

(c) where money or other property is obtained or retained by fraud, from the date of cause of action;

(d) where the claim is for dower or maintenance, from the date of the cause of action.

These are really some of the grounds on which interest could be allowed on equitable considerations even while the old Act was in force (*B. N. Rly.* v. *Ruttanji*, A 1938 PC 67; *Trojan & Co.* v. *Nagappa*, A 1953 SC 235; *Satinder Singh* v. *Umrao Singh*, A 1961 SC 908). Section 4 (2), however, leaves out some of the situations in which interest could be awarded in equity, hence in view of this sub-section being without prejudice to the generality of the provision of sub-section (1), those remaining equitable grounds will survive the express enactment of some of the grounds in sub-section (2), with the only difference that while in the circumstances specified in sub-section (2), the award of interest is, save in exceptional cases, obligatory, it will continue to remain discretionary in respect of other situations calling for exercise of equitable jurisdiction, namely, (i) where a particular relationship exists, such as mortgagor and mortgagee, obligor and obligee on a bond, executor and beneficiary, principal and agent or principal and surety; (2) where a person who is an officer of the court such as a sheriff, a solicitor or a receiver wrongfully withholds money which he has obtained in the course of legal proceedings (See, *Mst. Kishwar Jahan* v. *Zafar Mohd.*, A 1933 All 186, 55 All 164; *N. V. Joseph* v. *Union of India*, A 1957 Ker 3; *L. M. Das* v. *State of W. B.*, A 1961 Cal 456). Interest of amount refundable under contract was allowed in *official Receiver* v. *Bineshwar Prasad*, A 1962 Pat 155 (case law discussed).

Where there is express contract regarding interest and its rate the court cannot depart from it except in cases governed by the Usurious Loans Act or any local money lending law or the Hindu law of Damdupat which does not apply where interest is allowed on equitable grounds against a trustee of public religious trust retaining funds but only to cases of loan (*Hukumchand Jain* v. *Fulchand Jain*, A 1965 SC 1692). For private trusts, see section 23 and 94, Trusts Act. Against a trustee of public or religious trust interest at 4% p. a. was awarded in *Hukumchand*, *supra* (para 22), on the basis of a statement in the third edition of Halsbury's Laws of England, but this rate may be reviewed in the light of subsequent escalation in rates of interest generally.

Section 2(c) of the Interest Act, 1978 also defines debt as an ascertained sum of money *(compare* 'sum certain' in the old Act), but it should cover a sum ascertainable by a simple calculation in accordance with the terms of the contract (*State of Rajasthan* v. *Raghubir Singh*, A 1979 SC 852, (1979) 3 SCC 102). In the same case it has also been held that a notice of demand for past interest should be

No. 58—Claim for Interest After Notice

The plaintiff sent a notice to the defendant on June 2, 1995, demanding the aforesaid sum due under the contract (*or*, on account of damages for breach of contract; *or*, on account of compensation; *or*, on

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construed to imply a demand for future interest also under the Interest Act. If, however, the sum payable is contingent on the happening of an event which may never happen it is not a sum payable at the time (*Marine & New Brunswick Elec. Power Co.* v. *Alice M. Hurf*, A 1929 PC 185).

The new Act expressly includes an arbitrator and a tribunal in the definition of court, thus setting at rest the earlier controversy about power of arbitrator to award interest.

However, inspite of the liberalised provisions of the new Act, interest cannot be allowed merely because money due was detained or because arbitrator may consider it reasonable to do so unless the case falls under the recognised categories of equity or under contract, express or implied, or under custom or usage having the force of law or under a statutory provision including the Interest Act (see, *Thwardas Pherumal* v. *Union of India*, A 1955 SC 468; *Mahabir Pd.* v. *Durga Datt*, A 1961 SC 990; *Union of India* v. *Rallia Ram*, A 1963 SC 1685). Illustration (n) to section 73 Contract Act does not of its own force warrant a claim for interest as damages unless the same be otherwise claimable, e.g., after notice under the Interest Act.

If property is wrongfully retained and the owner is deprived of its profits or usufruct, a claim for interest is maintainable as an integral part of mesne profits (*Mahant Narayan Dasjee* v. *Tirupatti Devasthanam*, A 1965 SC 1231; *Hirachand Kothary* v. *State of Rajasthan*, A 1985 SC 998), but in a suit by a partner for his share of profits detained by another partner, interest was not allowed (*Vithaldas* v. *Rupchand*, A 1967 SC 188). Interest is also claimable in cases of compulsory acquisition of property even apart from sections 28 and 34, Land Acquisition Act (*National Insurance Co.* v. *L.I.C.*, A 1963 SC 1171; *Satinder Singh* v. *Umrao Singh*, A 1961 SC 908).

Claims of interest in respect of negotiable instruments are not governed by Interest Act, *see* section 3(3)(b)(i) but by section 80, Negotiable Instruments Act.

So far as transactions of sale of goods are concerned, section 61 Sale of Goods Act, 1930 provides that apart from any contract or other law (including equity and trade usage) under which interest is claimable the court may award interest on the amount of price (a) to seller from the date of tender of goods or date when price is payable, (b) to buyer in suit for refund of price in case of breach of contract, from date of payment. Thus where the price is payable on a day certain, even though delivery of goods may have been postponed interest can be awarded from that date. The reference to date of tender would be attracted where seller has option to deliver the goods during a stated period and the price is to be paid on delivery. But where the course of delivery shows that neither any date is fixed for

account of damages) and intimating the defendant that if payment was not made within one month of service of notice, interest at 18 per cent per annum would be charged.

No. 59— Claim for *Pendente lite* and Future Interest in a Commercial case

The rate at which moneys are presently lent or advanced by nationalised banks in relation to commercial transactions is seventeen and half percent per annum compoundable annually.

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payment nor demand for interest is made by seller interest cannot be allowed (*Kalyan Sahai* v. *Lachmi Narmain*, A 1951 Raj 11).

On sale of immovable property the seller has a right to interest on unpaid price under section 54 (4) (b), Transfer of Property Act.

In claims for compensation arising out of motor accidents, interest can be awarded from date of claim under section 110, Motor Vehicles Act.

Award of *pendente lite* and future interest is governed by section 34, C.P.C. which has also been considerably liberalised by the Amending Act of 1976 and takes into account the prevailing bank rates of interest in respect of commercial transactions. Thus courts are expected to award not the low rates of interest of 3% or 4% as was the convention in the past but higher rates in the light of the amended provisions so that it may not be unduly profitable for the defendant/judgment debtor to delay payment of the amount due. It will be necessary to plead and prove the commercial rate as a fact (see precedent No.59) in order to take advantage of this provision (*Sri Sreenivasa Co.* v. *V.D.H.A. Setti*, (1984) 2 An WR 238, A 1985 AP 21). Section 34 does not warrant award of interest at a lower rate than the contracted rate in a mortgage suit; in view of the provisions of O.34, R.11 the plaintiff is entitled to interest at the agreed rate till the date of redemption (*State Bank* v. *Rashmi Industries*, 1984 Cutt LT 540 case law discussed).

In every claim for interest, the contract for its payment, or facts bringing the case within a particular rule of law under which it is claimed should be given. If it is claimed under a custom of trade, the custom must be alleged. If the claim is made on equity, facts entitling the plaintiff to the relief should be stated.

A claim for interest is generally added to that for principal. But if interest is payable under a contract before the principal, the same can separately sued for.

Defence : The defendant may plead absence of any of the elements making the claim fall with in any rule of law. He may plead tender of the principal money, the date from which his liability for interest ceases. He may plead that he was prevented by the creditor from making payment (*Gopeshwar* v. *Jadab*, 2 CWN 689). Against a contractual rate of interest, he can plead the aid of the Usurious Loans Act or of any State legislation regulating money-lending, or of sections 16 or 74, Contract Act or that the contract is void as the interest provided exceeds that prescribed by law. But in the absence of fraud or undue influence or anything to suggest that the creditor

No. 60—Suit for Interest only

1. The defendant borrowed Rs.1,000 from the plaintiff under a bond, dated June 9,1994, payable after 6 years, and by the same bond, the defendant agreed to pay interest on the said Rs.1,000 at 12 per cent per annum regularly every half year.

2. The defendant has not paid any interest. The plaintiff claims Rs.120 on account of interest for the first two half years.

JUDGMENT *(s)*

No. 61—Suit on a Foreign Judgment

(Form No. 11, Appendix A, C.P.C.)

1. On the ___ day of _____ 19__, at _____, in the State (*or*, Kingdom) of ___ the ____ court of the State (*or*, Kingdom),

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took an undue advantage, mere excessiveness of the interest is no ground for its reduction (*Madhu Mangal* v. *Gouri Sunder*, 60 IC 733 Cal; *Nabin* v. *M. Rabeya*, 5 R. 619, 106 IC 181). Under the Usurious Loans Act court can reduce the interest even if defendant does not take the plea in the written statement (*Kaderbhai* v. *Fatmabai*, A 1944 Bom 25). Even under the Usurious Loans Act high rate is not necessarily regarded as excessive or unfair and creditor may show that the prevailing rate in the locality is nearly the same or that the high rate was justified by the risk the creditor was taking (*Babu Ram* v. *Jograj*, 27 ALJ 1174, 118 IC 375). In most states now money lending laws have been passed replacing the Usurious Loans Act. These laws are much more stringent and comprehensive, but if benefit of such law is to be sought then generally it is necessary to plead and prove that the loan had been advanced by the plaintiff in the regular course of money lending basis. Such Acts should be consulted in order to be able to take proper pleas. For the form of a plea under section 16 Contract Act, *see* "General Defences (Undue Influence)". If the contract is contained in written document, the defendant cannot plead that he had agreed to the rate as the plaintiff had represented to him that he would charge lower rate, as that plea would be barred by section 92, Evidence Act (*Sukh Lal* v. *Murari Lal*, A 1926 Oudh 273 DB). Where interest not contracted for is claimed, he can plead that it is excessive.

(s) A suit, on the basis of a judgment, would generally be necessitated only in cases of judgments of foreign countries. If the defendant resides in India and satisfaction of the decree cannot be obtained in the foreign territory, a suit may be brought in India on the basis of the foreign judgment. It is not necessary, in such cases, to allege the original cause of action, although a creditor can also bring suit on original cause of action because the foreign judgment does not extinguish the original cause of action for the debt (*Gopal Singh Hira Singh* v. *Punjab National, Bank*, A 1976 Delhi 115; *Badat & Co.* v. *East India Trading Co.*, A 1964 SC 538;

in a suit therein pending between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff _____ rupees, with interest from the said date.

2. The defendant has not paid the money.

No. 62—Suit on a Foreign Judgment

1. On the 20th day of March, 1980, the Queen's Bench Division of the High Court of Justice of England, in a suit therein pending between the parties (1980, B. No. 161), adjudged defendant to be liable to pay to the

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Kobal Singh v. *Punjab National Bank*, A 1976 Del 115). **It is sufficient to allege the judgment and the liability of the defendant under it, and the fact that the defendant had not discharged that liability.**

It is also the practice to allege that the foreign court had jurisdiction over the parties or the case, but strictly speaking this is not necessary, such jurisdiction being presumed until the contrary is proved (*Robertson* v. *Struth*, 5 QB 941; *Henderson* v. *Henderson*, 6 QB 288; *N.K.R.M.A. Ramanathan* v. *S.V.K. Lakshmanam*, 49 IC 202 Mad). In order to determine the money claimed on a judgment of an English court, the rate of exchange prevailing on the date of judgment should be taken into account (*Madhavji* v. *Ramniklal*, 47 B 487).

Limitation : Three years from the date of judgment (Article 101), even though execution may be barred under the law of the foreign court (*Jaisukh Lal* v. *Mohammed Hussain*, A 1939 Bom 522). It cannot be extended by reason of any application for review or rehearing made in the foreign court. (*Hari Singh* v. *Muhammad Said*, 102 IC 523, 8 Lah 54, A 1927 Lah 200 DB) ; but if an appeal is preferred and dismissed, limitation will run from the date of appellate judgment (*Baijnath* v. *Vallabhdas*, A 1933 Mad 511, 1933 MWN 453, 65 MLJ 572, 144 IC 853). The original judgment merges in an appellate judgment and does not survive it.

Defence : To a suit on a foreign judgment, a defendant may plead any of the grounds mentioned in section 13, C.P.C. or he may plead reversal of the judgment by court of appeal or satisfaction of the decree by the defendant. Judgment given after striking off the defence for default in answering interrogations and after the suit had thus become an undefended one is not a judgment on merits within section 13 (b) and no suit can be brought upon it (*Keymer* v. *Vishwanatham*, 15 ALJ 92, 40 M 112, 32 MLJ 35, 19 BLR 206, 21 CWN 358, 25 CLJ 233, 10 Bur LT 175, 38 IC 683). Similarly, when a judgment was given under special rules prevailing in Penang, in an *exparte* case without taking any evidence and on plaint allegations only, it was held that no suit could be brought in India on such judgment (*R.E. Mohomed Kassim* v. *Seeni Pakir*, 100 IC 555, 52 MLJ 240, A 1927 Mad 265, 25 MLW 307 FB). A foreign judgment not based on merit is not conclusive (*R.M.V. Vellachi Achi* v. *R.M.A. Ramanathan Chettiar*, (1972) 2 MLJ 468; *Gurdas Mann* v. *Mohinder Singh Brara*, A 1993 P&H 92; *Algemene Bank Netherland* v. *Satish Dayalal Choksi*,

plaintiff the sum of £ 2,000 with interest from the date of judgment to that of realisation at 15 per cent per annum.

2. The defendant has not paid the said amount or any part thereof, nor has satisfaction for the amount or any part thereof been obtained by execution.

A 1990 Bom 170). An exparte decree obtained under the summary procedure of court of Ceylon (*Isidore Fernando* v. *Thommai Antoni Michael Fernando*, A 1933 Mad 544), or a decree obtained under the summary procedure after defendant's application for leave to defend was rejected by a foreign court (*O. P. Verma* v. *Lala Gehrilal*, A 1962 Raj 231; *K. M. Abdul Jabbar* v. *Indo Singapore Traders*, A 1981 Mad 118), are not conclusive, as they are not on merits. Similarly, a decree passed against a minor without appointing a guardian *ad litem* for him or after appointing guardian whose interest was adverse to the minor or after appointing the Nazir of the court as guardian when the minor lived in India (*Gajanan* v. *Shantabai*, A 1939 Bom 374, 185 IC 57), is opposed to natural justice and a suit cannot be brought upon it in the Indian courts (*Popat* v. *Damodar*, 36 BLR 844, A 1934 Bom 390). A judgment by a biased court is also opposed to natural justice and is a nullity (*R. Vishwanathan* v. *Rukn-ul-mulk Syed Abdul Wajid*, A 1963 SC 1). But a judgment cannot be said not to be on merits merely because it is passed *ex parte*, if it was based upon a consideration of the truth or otherwise of the plaintiff's claim (*Wazir* v. *Munshi*, 190 IC 545 Pat). A decision may be on merits even though passed *ex parte* if some evidence is adduced (*Abdul Rahman* v. *Mohamed Ali*, A 1928 Rang 319; *Sundaram* v. *Kandasami*, A 1941 Mad 387). An *ex parte* decree of a foreign court on default of depositing the amount which was made a condition of granting leave to defend seems to be one on merits. (*Shalig* v. *Firm Dowlat Ram*, A 1967 SC 379). In the field of private international law, courts refuse to apply a rule of foreign law or recognise a foreign judgment or a foreign arbitral Board if it is found that the same is contrary to the public policy of the country in which it is sought to invoked or enforced (*Renusagar Power Co. Ltd.*, v. *General Electric Co.*, A 1994 SC 860).

The fact that an appeal is pending from the foreign judgment is, however, no defence, though the court might, for the sake of justice, stay proceedings of the suit on being informed of the pendency of the appeal (*Hari Singh* v. *Muhammad Said*, 102 IC 523, A 1927 Lah 200 DB).

The defendant may plead that he was not the subject of the foreign state nor did he reside within the state nor did he submit to its jurisdiction, as in such a case the judgment is not, according to international law, binding, but the burden of proving these facts is on the defendant (*Ishri Prasad* v. *Shri Ram*, 105 IC 186, A 1927 All 510, 25 ALJ 887 DB). Submission to jurisdiction which makes a judgment binding should be before decision (*Narapa* v. *Govinraja*, 57 M 824, 149 IC 1168, A 1934 Mad 434, 1934 MWN 626). But he cannot plead that judgment was erroneous or obtained by fraud committed by witnesses; fraud committed by plaintiff alone can avail (*Popat* v. *Damodar*, A 1934 Bom 390, 36 BLR 844). Where a decree is a

The plaintiff, therefore, claims Rs. _____, being the Indian equivalent of £ 2,000 as principal and Rs. _____, as interest with further interest from the date of suit to that of payment at 15 per cent per annum.

LANDLORD AND TENANT

No. 63—Suit for Arrears of Rent *(t)*

1. By a deed of lease, dated June 22, 1993, executed by the plaintiff and defendant, the plaintiff let the house bounded as follows and situate in Mohalla Maliwara, Delhi to the defendant for a period of two years and

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nullity on the day it is passed on the ground that the defendants neither resided within the court's jurisdiction nor had submitted to it, it cannot be executed against defendants, outside the jurisdiction of the court passing it. Article 261(3) of the Constitution has no application to such a decree (*Malo ji Rao* v. *Sankar Saran*, A 1958 All 775, affirmed by Supreme Court in, A 1962 SC 1737).

(t) In a suit for rent, **the agreement for rent must be alleged, and also the amount of arrears.** If the lease was for a fixed term and rent is claimed for that term, it is not necessary to allege defendant's possession during the period in suit, as he is bound to pay rent for the stipulated period of tenancy, but if the lease is not for a fixed term, the plaintiff must allege that defendant was in possession during the period in suit. It is not necessary to plead the plaintiff's title to the property in a suit on the basis of tenancy as the defendant is estopped from denying it (*Kumar Raj Krishna* v. *Barahhani Coal*, 62 Cal 346, A 1935 Cal 368), but if the plaintiff claims as successor of the person who had put the defendant in possession, the defendant can deny his title as such successor and therefore he should plead it (*Dalat Ram* v. *Haveli Shaba*, 182 IC 533, A 1939 Lah 49). The whole amount in arrears at the date of suit must be claimed. Otherwise O. 2 R.2, will bar a subsequent suit (see chaps, XI and XIV *ante* also for O.2 R.2,). One of several joint owners is not entitled to bring a suit for his share of rent. He may sue for whole rent (*Radhabinode* v. *Naba Kishore*, 94 IC 244, 30 CWN 415, A 1926 Cal 578 DB; *Manbodh* v. *Jaswant*, 20 PLT 282), and in such cases it is better to implead the others as *pro forma* defendants. If the lease is legally inadmissable in evidence for want of registration or other formal defect it is better to claim the rent in the alternative as damages for "Use and Occupation" (*see* Precedent under that heading) The suit must be for the whole rent of the whole holding, as a suit for rent of part of the holding does not lie (*Ram Chandra* v. *Ram Ghulam*, A 1938 Pat 305, 177 IC 529).

It must be taken as well established that a joint owner or cosharer is not entitled as such to sue for proportionate rent, but it has been held that though this is undoubtedly the established rule, nevertheless, if the parties, namely, the landholders and the tenants agree to accept and pay proportionate rent according to shares, there is nothing illegal in such an arrangement. Such agreement between the parties must be pleaded and proved in one or the other ways known to law

the defendant covenanted to pay Rs 2,000 per month on account of rent.

Boundaries of the said house

* * * *

2. The defendant has been in possession under the said lease during the period August 1995 to November 1995, but has not paid the rent for the said period, [or, (*if the suit is for period covered by the lease), the* rent for the period August, 1995 to November, 1995 is in arrears].

(*Venkatakrishna Reddi* v. *Govindraja Mudaliar*, (1953) 1 MLJ 814). A tenancy for a fixed period determines only by efflux of time, the death of the tenant, during the term, has absolutely no effect and his legal representatives continue to be tenant for the remainder of the term. However, a lease for an indefinite period is determined by the death of lessee (*Raman Lal* v. *Bhagwan Das*, A 1950 All 583, 1951 ALJ 179). A lease for less than a year is a lease for indefinite period (*Rattanlal* v. *Vardhesh Chandra*, A 1976 SC 588). A lease providing that the tenant would continue in possession so long as he pays rent is regarded as lease for the life time of the lessee (*B.P.Sinha* v. *Somnath*, A 1971 All 297), and consequently it would determine on the death of the tenant. But a lease by holding over is heritable (*K.Belchappada* v. *Vishnu Shanbhogue*, 1971 KLT 340, relying upon *Raman Lal* v. *Bhagwan Das*, A 1950 All 583 and *Ram Nath* v. *Neta*, A 1962 All 604).

Where a landlord actively continues the prosecution of the case or appeal with regard to ejectment of the tenant, mere acceptance of rent by him cannot be treated as waiver so as to to deprive him of the right of execution of ejectment decree (*Khumani* v. *Saktay Lal*, 1951 ALJ 331; *Hari Shankar* v. *Chaitanya Kumar*, 1968 ALJ 387; *Bhawanji Lakhamshir* v. *Himatlal Jamna Das Dani*, A 1972 SC 819; *Sharda Sharma* v. *Gulab Devi Ohwon*, A 1972 All 435; *Purohit Lakshmanchandji* v. *Vecha Shree Ramchandra Murty*, A 1976 AP 428).

On statutory tenancy under urban buildings rent control legislation, see *Sudhir Kumar Chakraborty* v. *Ashutosh*, A 1980 Cal 108; *Biswabani Ltd.*v. *S.K. Dutta*, (1980) 1 SCC 185; *Mani Subrat Jain* v. *R.R.Vohra*, A 1980 SC 299; *Tatoba Krishna* v. *Dikkayya*, 1980 Mah LJ 229). On service occupation (i.e., licence by employer to occupy his quarters in connection with service) as distinguished from tenancy (see *B.M. Lall* v. *Dunlop Co.*, A 1968 SC 175 ; *Lal Behari* v. State, 1955 ALJ 564).

Limitation : Three years from due date (Article 52).

Defence : The defendant may deny the tenancy, but, if he admits it, he cannot deny plaintiff's title to the property or right to receive rent but may even in that case deny the particular contract of tenancy set up by the plaintiff (*Mt. Nasiban* v. *Mohammad Sayed*, 164 IC 557, A 1936 Nag 174), or he may plead that the title of the plaintiff has passed to someone else after the commencement of tenancy (*Luckman* v. *Pearey Lal*, A 1939 All 670). If the suit is by an heir of the lessor, defendant may

The plaintiff claims:

(1) Rs.8,000 on account of rent.

(2) Rs.____ on account of interest at the rate of 1 per cent per mensem.

(3) Interest from date of suit to date of payment.

No. 64—Suit for Ejectment on Determination of Tenancy by notice, with Claim for Mesne Profits *(u)*

1. Under a verbal contract of March 25, 1992, the defendant held for the purpose of residence, the house described below, as a plaintiff's tenant from month to month, at a monthly rent of Rs.300. His tenancy commenced on March 25, 1992.

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deny the heirship or may plead that the interest of the lessor was not heritable. The defendant may plead that he has not been put in possession of the whole property leased or has been dispossessed from a portion of it, and therefore a proportionate reduction should be made from the rent. In England, the rule in such cases is that the whole rent is suspended, but the doctrine of suspension of rent is not applicable in India and it will depend on the circumstances of each case whether the tenant is entitled to suspend the rent or remains liable to pay a proportionate part thereof (*Surendra Nath Bihra* v. *Stephen Court Ltd.*, A 1966 SC 1361; see also, *Apparel Trends* v. *Krishna*, A 1985 Del 1067). If the defendant was entitled to spend money on repairs and has spent it, he may claim adjustment of the same, and limitation therefor is six years under section 30 read with Article 113 (*Indumati* v. *Jhola*, A 1985 SC 369).

(u) In every suit for the ejectment of a tenant, it is **necessary to allege specifically the ground on which the ejectment is sought** (*Dariyai Singh* v. *Chob Singh*, A 1926 All 248 DB, 91 IC 863). In several states local Control of Rent and Eviction Acts have been passed, which restrict the right of ejectment. Where such an Act exists, facts should be stated in the plaint to show that according to it, the plaintiff has the right to sue for ejectment. A tenancy, which is neither permanent nor for a fixed term, can be determined by a notice to quit. The notice should be in writing, signed by, or on behalf of, the person giving it , and, if there are several lessors, all must join in the notice. But a notice to terminate the tenancy of a tenant of a trust need not be given by all the trustees (*Idol Shivji Lakherapura Bhopal* v. *Goppulal*, 1977 MPLJ 804). The notice should, however, purport to be on behalf of all the lessors, otherwise notice given by one joint lessor should not be sufficient to terminate the tenancy (*Jamil Ahmad* v. *Madhawanand*, A 1979 All 104). Notice to quit given under the signature of one joint lessor mentioning "we give you notice",etc., is valid as it must be taken to have been given on behalf of all the joint

Description of the House

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2. The plaintiff duly determined the said tenancy by serving on the defendant, by registered post, on September 27, 1994, a notice to quit

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lessors (*Madhusudan Prasad Agarwal* v. *Sushma Bala Dasi*, A 1979 Pat 6; *S.P. Roy Choudhary* v. *K.B.Roy*, (1978) 2 SCC 89). Where one co-owner alone is landlord notice by him is sufficient, so also a suit by him (*Sri. Ram Pasricha* v. *Jagannath*, (1976) 4 SCC 184).

The notice should be served either personally on the tenant or on a member of his family or on a servant at the tenant's residence, or by post, or by affixing it to a conspicuous part of the property, if personal service is not practicable (section 106 Transfer of Property Act). Tender of the notice is sufficient though the tenant may refuse to accept it. If a notice is sent by post, proof of posting and non-return will raise a presumption of its service (*Harihar* v. *Ram Shahi*, 46 C 958 PC). This presumption is not displaced, if when a notice is sent by registered post, an acknowledgment is received purporting to be signed by someone else on behalf of the addressee (*Bodardoja* v. *Ajijuddin*, 33, CWN 559, 49 CLJ 555, A 1929 Cal 651 DB; *Bachalal* v. *Lachman*, 176 IC 393, A 1938 All 388). If there are several tenants in common the notice should be addressed jointly to all (*Budh Sen* v. *Sheel Chand*, A 1938 All 88) though service of such a notice on one is evidence of information to all (*Lila Dhar* v. *Ramji Das*, 1956 ALJ 650; *Shrinath* v. *Sarasvati Devi*, A 1964 All 52; *Kanji Manji* v. *Port Trust*, A 1963 SC 468). A decree for eviction obtained against some joint tenants is not binding against others who are not parties to the decree (*Mohd Mustfa* v. *Mansoor*, A 1977 All 239). Hence all the joint tenants must be impleaded as defendants in the suit.

Notice should show a definite intention to terminate the tenancy. When a notice is stipulated in the lease or is required by a local usage, it should conform to the contract or usage. In case of tenancy from year to year, 6 months and in case of tenancy from month to month, 15 days notice ending with year or month of tenancy, as the case may be is required unless there is a contract or custom to the contrary. Lease for agricultural or manufacturing purposes is presumed to create a tenancy from year to year and leases for other purposes, a tenancy from month to month. From the mere fact that an yearly rent is reserved there is no presumption that the tenancy was from year to year (*Chimiti* v. *Kirpa*, A 1941 Pat 488 , 194 IC 300). The six months or 15 days' time given by it is the minimum and there is no objection to giving a longer notice but it should expire with the year or month of the tenancy (*Bagchi* v. *Morgan*, 161 IC 897 , A 1937 All 36; *Sheikh Nuroo* v. *Seth Meghraj*, 174 IC 790, A 1937 Nag 139). It should not require the tenant to vacate the premises before or after the last date of the tenancy. In U.P. 30 days' notice is necessary in a case of monthly tenant but it need not expire with the month of tenancy (U.P. Act 24 of 1954).

the said house at the close of October 24, 1994, yet the defendant has not vacated the house.

Where A agreed to let a godown to B for three years from 1st June but a lease was not actually executed and the tenant remained a month to month tenant, the tenancy terminated on the last date of the month and not on the 1st June as it would have terminated under section 110 if the lease had been executed. Now section 106 and not 110 would apply (*Calcutta Landing and Shipping Co.* v. *Victor Oil Co.*, A 1944 Cal 84). Notice to vacate "on or before" the end of tenancy, has been held to be good (*Ismail* v. *Bai Zulaikhabai*, A 1944 Bom 181). Notice to quit asking the tenant to vacate within the month of October 1962, otherwise he should be treated as trespasser with effect from November 1, 1962 was held valid (*Bhagwan Das Aggarwal* v. *Bhagwan Das Kanu*, A 1977 SC 1120).

Many suits are dismissed for some defect in the form of the notice. The law should, therefore, be clearly understood before drafting a notice, and before drafting a plaint, the pleader should satisfy himself of the correctness and sufficiency of the notice given. A mere demand for possession is not a notice to quit (*Narayana* v. *Kunbhan Mannudiar*, A 1949 Mad 127, 1942 MLJ 559, 1947 MWN 775). In view of the rent control laws and the concept of statutory tenancy evolved in respect of urban building it is now not generally necessary to determine tenancy by a notice to quit before claiming ejectment on grounds admissible under such laws (*Dhanpal* v. *Yashodai*, A 1979 SC 1745).

The facts that the tenancy was a tenancy at will, the "purpose for which it was created, and the exact notice given should be set out in the plaint". The date of the expiry of the month or year of tenancy and the exact date on which the tenancy was determined by notice (where required) should also be stated. It is not necessary to allege the plaintiff's title, as the defendant cannot delay it, even after the expiry of the term of the lease so long as he does not hand over possession to the lessor (*Bilaskaur* v. *Desaraj*, 37 A 557 (PC); *Kumar Raj Krishan* v. *Barabani Coal*, 62 Cal 346, A 1935 Cal 368; See also Chap VIII ante for decree on basis of title where tenancy is not proved).

Court-fee : A suit for ejectment can be brought on a court-fee calculated on a year's rent. The same will be its valuation for the purpose of jurisdiction (*Narayanswamy* v. *Vennavai*, 39 M 873, 31 IC 104).

Procedure : All the co-sharers must join as plaintiffs in a suit for ejectment of a tenant (*Gholam* v. *Mt. Khairan*, 31C 786), but a tenant continuing in occupation after the expiry of the period of lease is a tenant on sufferance whose position is akin to that of a trespasser hence he can be sued by one of the co-sharers (*Ahmad Sabib* v. *Magnesite Syndicate Ltd.*, 29 IC 60, 39 M 501, 17 MLT 387, 28 MLJ 598; *Maganlal* v. *Budhar*, 101 IC 35, 29 BLR 230; *Yeswant* v. *Keshav*, 41 BLR 1213, A 1940 Bom 13, 186 IC 92; *Vinode Sagor* v. *Vishunbai*, A 1947 Lah 388). One co-sharer can eject a trespasser without impleading other co-sharer in the suit (*Mahabir Singh* v. *Shyam Nandan Prasad*, A 1972 Pat 304) [See also Chap. XII, ante].

3. The defendant has not paid the rent from June 25, 1994, or any part thereof.

4. The defendant has (*here mention the facts entitling the plaintiff to sue for ejectment under the local Control of Rent and Eviction Act, if any*) and is thus liable for ejectment under section ____ of the said Act.

A claim for rent may be joined with a claim for ejectment, and in that case **the rent agreed upon and the period for which it is in arrears should be given in the plaint.** But as after the period fixed in the notice, the defendant's possession becomes wrongful, damages for use and occupation and not rent should be claimed for the period, which may be more than the rent (*Suresh Chandra* v. *Kanti Chandra*, 110 IC 715, A 1928 Cal 436, 47 CLJ 530 DB; *Ubdur Rahman* v. *Darbari*, A 1933 Lah 509, 146 IC 845). Sometimes, in the notice to quit the lessor also warns the lessee that if he remains in possession after the expiry of notice damages will be charged at a particular rate. This may be penal, and the court is not bound to award damages at that rate (*Ramaswamiengor* v. *Ramamurthi*, 8 Mys LJ 130). But the Allahabad High Court has held in one case that such enhanced rent can be recovered on the ground of contract implied by defendant's remaining in possession (*Madan Mohan* v. *Bobra Ramlal*, A 1934 All 115, 1934 ALJ 921). The maximum that can be claimed as damages is the rent payable under Rent Control Act (*Dwarika Pd.* v. *Central Talkies*, A 1956 All 187). But in *Chiranjilal* v. *Kunwar Pd.*, A 1963 All 249, it was held that the amount to be awarded should be assessed according to the reasonable market value of the accommodation. The Nagpur High Court has held that enhanced rent may be allowed if it was not penal or improbable, if the tenant refuses to quit; but if he requires a little time for winding up his business he can occupy for such time on the original rent (*Parekh* v. *Anant*, A 1940 Nag 140, 189 IC 895). The court has to investigate if the enhanced rent claimed by landlord is otherwise equitably justified and has the power to fix fair and equitable rent (*Union of India* v. *Andhra Bank Ltd.*, A 1976 Mad 387).

Limitation : Twelve years from the determination of the tenancy (Article 67 of the Act of 1963).

Defence : Any flaw in the notice is a complete defence to such a suit. A suit for eviction is liable to be dismissed for want of proper notice to quit (*Manujendra Dutt* v. *Purnedu Prasad Roy Chowdhury*, A 1967 SC 1419). But plea of absence of proper notice to quit will have to be raised by defendant at an appropriate stage (*Magan Lal Chhotabhai Desai* v. *Chandrakant Motilal*, A 1969 SC 37) because absence of notice does not make the proceedings before court a nullity, as if lacking inherent jurisdiction (*S.A. Henry* v. *J.V.K. Rao*, A 1972 Mad 64). If such a plea has not been taken it will be deemed that the objection as to the lack of notice was waived (*Bosta Ram* v. *Balmukund*, (1971) 73 Punj LR (D) 217; *Batoo Mal* v. *Rameshwar Nath*, A 1971 Delhi 98; *P.Kochukrishna Pillai* v. *Achi Ammalu Ammal*, A 1972 Ker 257; *Ram Pratap* v. *Birla Cotton Spinning & Weaving Mills Ltd.*, A 1973 Delhi 124). Even if the defendant pleads that the land belongs to a third

The plaintiff claims :

(1) Possession of the said house.

(2) Rs.1,200 on account of rent from June 25 to October 24, 1994.

(3) Rs. 2,000 on account of damages for use and occupation at Rs.500 per mensem being the letting value of the house, from October 25, 1994 to the date of suit, and further damages upto the date of delivery of possession at the same rate.

No. 65—Suit for Ejectment on Expiry of Term *(v)*

1. The plaintiff let the house described below to the defendant, by a deed of lease, dated February 1, 1987, for a term of eight years.

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person, the latter need not be impleaded (*Subramanya* v. *Ananth*, 139 IC 679, A 1932 Mad 688).

(v) No notice is required in this case. But if the lease by which term was fixed is not a valid lease, e.g., if it is not registered though it is required by law to be registered, or there is no lease but a mere *kabuliyat or kirayanama*, which cannot amount to a lease as it is not a bilateral document as required by section 107, Transfer of Property Act, no tenancy for the fixed period could legally be created, but the tenancy may be treated as one from month to month or from year to year as the case may be, and a notice will be required to determine it . If there is holding over, i.e. if after expiry of the term, the tenant is still treated by the landlord as his tenant, a tenancy is created and is determinable by notice (section 116, Transfer of Property Act). **Rent for the period after the expiry of the term should be claimed not as rent but as damages for use and occupation.** If the tenant is not treated as tenant after expiry of the term of lease, but he remains in possession, his possession is that of tenant by sufferance, which is akin to that of trespasser (*Jagarnath* v. *Janki*, 66 IC 337, A 1922 PC 142, 49 IA 81, 43 MLJ 55, 26 CWN 833) and in such cases even one of the several landlords can sue for ejectment (*Yeshwant* v. *Kesav*, 41 BLR 1213, A 1940 Bom 13). In such a case if suit is not brought within 12 years, the landlord's right to eject was held to be barred by Article 139 (*Laifqut Ali* v. *Muhammad Baksh*, 102 IC 231 All). Now Article 139 has been substituted in the Act of 1963 by Article 67. In the case of tenant by sufferance, no notice is necessary (*Gordhan* v. *AliBux*, A 1981 Raj 206).

Defence : The defendant may plead that the lease was invalid, or that he was re-admitted to the tenancy by an express contract, or by conduct, such as acceptance of rent by the plaintiff for a period after the expiry of the term. Acceptance of rent after the expiry of term, for a prior period, does not amount to the renewal of the tenancy. He cannot plead that he is entitled to a renewal of the lease under the terms of his lease, for he can enforce such terms only by a separate suit for specific performance (*Sewakram* v. Municipal *Board, Meerut* 169 IC 145, A 1937 All 328.). He cannot plead title of third person (*Pusram* v. *Deorao*, A 1947 Nag 188).

Description of the House

* * * *

2. The said term expired on January 31, 1995, but the defendant has not delivered possession and is still in possession.

3. The defendant has *(here mention the facts entitling the plaintiff to sue ejectment under the local Control of Rent and Eviction Act, if any)* and is thus liable for ejectment under section __of the said Act.

The plaintiff claims :

(1) Possession of the said house.

(2) Rs.1,200 on account of damages for use and occupation at Rs.400 per mensem being the letting value of house, from February 1, 1995 up to date of suit, with future damages for use and occupation up to the delivery of possession at the same rate.

No. 66—Suit for Ejectment on Ground of Forfeiture *(w)*
(For Breach of a Covenant)

1. By a deed of lease, dated September 9, 1992, the plaintiff let his house situate in Rani Bazar in the town of Saharanpur and bounded as follows to the defendant (*or*, defendant No.1) for three years at a monthly rent of Rs.30.

(w) A forfeiture of lease occurs: (1) when the lessee breaks an express covenant of the lease, on breach of which the lease becomes void, or a right of re-entry is reserved to the lessor, or (2) when the lessee denies the lessor's title by setting up title in himself or in a third person, but a lease for fixed term cannot be forfeited on this ground (*Maharaja of Jaipore* v. *Rukemini*, 42 M 589, 17 ALJ 552 PC).

But in either case, the lease is not determined unless the lessor or his transferee gives notice in writing to the lessee of his intention to determine it. The notice need not be in any specified form and need not give any specified time (section 111 (g), Transfer of Property Act). If the lease was entered into before Transfer of Property Act was extended to that area , notice in witting to the lessee of his intention to determine the lease is not necessary as the rule in section 111 (g) is not a rule of justice, equity and good conscience (*Rattan Lal* v. Vardesh *Chander*, A 1976 SC 588, (1976) 2 SCC 103).

The specific condition of the lease and its breach, or a definite and unequivocal denial of title, must be alleged in the plaint. The giving of notice under section 111(g) should also be alleged *(vide* Chap III under "Condition Precedent") When a lease is not alleged in the plaint and the allegations do not amount to more

Boundaries of the House

* * *

2. By the said deed, the defendant agreed to pay rent regularly every month, and further agreed that in case of default in payment of rent for any two months the plaintiff should be entitled to resume possession (*or*, the said defendant No. 1 agreed not to sublet the house to any other person and, further, that if he did so, the plaintiff should be entitled to terminate the lease).

3. The defendant took possession under the said lease, and is still in possession thereof. He paid rent to the plaintiff upto September 9, 1994, but has not paid the rent which accrued due on October 9, November 9 and December 9, 1994, (*or*, by a verbal agreement on September 15, 1994 the defendant No. 1 sublet the said house to defendant No. 2 and has put the said defendant No.2 in possession).

4. On December 17, 1994, the plaintiff sent by registered post a notice to the defendant (*or*, defendant No.1) putting an end to the tenancy

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than this that the defendant was a licensee who paid rent, section 111 (g) cannot be applicable (*Kanhaya Lal* v. *Abdullah*, 160 IC 866, A 1936 All 385). The denial of title must be express, and not merely casual, must have been made to the knowledge of the plaintiff (*Komalukutti* v. *Pulikalakath*, 41 M 629), must have been specific and unequivocal (*Sardar Singh* v. *Man Singh* 100 IC 646 All), and must have been made before the suit and not in the pleading in the suit itself (*Mir Haider* v. *Jakiram*, 122 IC 271, *Balkaran* v. *Gangadin*, 36 A 370; *Quadir* v. *Prag*, 35 A 145, 9 ALJ 794; *Naurang* v. *Janardan*, 45 C 469; *Indar* v. *Achhru*, 110 IC 45 Lah; *Darbar* v. Barelal, 162 IC 797, A 1936 Pat 275). It must be noted that the landlord should in such cases take legal proceedings to determine the tenancy, and breach of condition cannot *ipso facto* amount to a cancellation of the lease. The landlord cannot, therefore, give a new lease to another person entitling the latter to sue the old tenant as a trespasser (*Ambika* v. *Beni Madho*, 118 IC 841, A 1929 Oudh 529).

Forfeiture can be made of the entire tenancy and not of part only (*Soorayya* v. *Sooranna*, A 1936 Mad 252). But in a case of forfeiture for unauthorised assignment, where the lease was in favour of several persons and then shares were separately specified it was held that forfeiture of the whole tenancy of all the tenants should not be made but only in respect of the share of the tenant in fault (*Pancham Singh* v. *Promotha Nath*, 164 IC 358, A 1936 Pat 450).

The landlord may in the alternative sue for injunction restraining breach by the tenant in future.

Defence: The defendant may plead that the denial of title was not clear and that he never meant to deny the title of the plaintiff, that the plaintiff did not give the

on the ground of the aforesaid breach of covenant in the lease and the said notice was delivered to the defendant (*or*, the defendant No.1) on December 18, 1994.

The plaintiff claims:

(1) Possession of the said house.

(2) Rs._____, on account of arrears up to December 17, 1994.

(3) Rs._____, on account of damages for use and occupation from December 18, 1994 upto the date of suit, with future damages upto the date of delivery of possession.

No. 67—Ditto (For Denial of Title)

1. The plaintiff let the house described below to the defendant, by a verbal agreement, on December 14, 1994, and the defendant entered into possession on that date and has been in possession ever since.

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required notice, or that the plaintiff has done an act (e.g., acceptance of rent or levying a distress) which amounts to a waiver of the forfeiture (section 112). Or, where the condition broken is that of payment of rent, the defendant may admit and pray for relief against forfeiture under section 114 by paying the rent with interest and full costs or by giving security to pay the same within 15 days. The defendant may show that the title of the plaintiff had determined after the lease and before he denied it (*Vendu* v. *Nilkanth*, 22 B 228). Where the condition broken was against alienation, defendant cannot plead that the implication was that the consent to alienation would not be unreasonably withheld when he never asked for the landlord's consent at all (*Thakur Dayal* v. *Rai Promotha Nath*, 164 IC 811(2), A 1936 Pat 493). He may plead waiver of the forfeiture by any subsequent act or conduct of the landord, but waiver of one breach will not bar the right of forfeiture of a subsequent breach (*Muhammad Hassan* v. *Baidya Nath*, 184 IC 605, 12 RP 253, A 1940 Pat 140). Acceptance of rent falling due after breach amounts to waiver but not the acceptance after institution of suit (*Motilal* v. *Pure Jambar Colliery*, 44 CWN 1109; *Chotu Mian* v. *Mt Sundari*, A 1945 Pat 260), but to establish waiver by acceptance of rent, tenant must show landlord's knowledge of his right to enforce forfeiture and acceptance of rent with conscious abandonment of that right (*Fatehlal* v. *Dayal*, A 1949 Nag 218; *Sen & Co.* v. *Mani Bala*, A 1980 Cal 155). Long acquiescence by the landlord in the change of purpose of user by the tenant may disentitle him from claiming injunction (*Ram Gopal Banarasi Das* v. *Satish Kumar*, A 1986 P & H 52, FB).

In all suits for ejectment from house or other accommodation to which any Control of Rent and Eviction Act is applicable, the tenant may also rely on the protection against eviction afforded by the relevant Act, denying the facts on the basis of which the landlord seeks to deprive him of the protection.

Description of the House

* * * *

2. In a written statement which the defendant filed in this court on April 14, 1995, in suit No.22 of 1995, which the plaintiff had brought for arrears of rent against him, the defendant stated that he was the owner of the house and the plaintiff had no title to it.

3. On July 8, 1995, the plaintiff sent a notice to the defendant by registered post putting an end to the defendant's lease by reason of the defendant's aforesaid denial of the plaintiff's title. The said notice was delivered to the defendant on July 10, 1995.

The plaintiff claims (*same as in Precedent No. 66.*)

No. 68—Suit by Gaon Sabha for Recovery of Possession of House on *Abadi* Site after Abandonment or Escheat *(x)*

1. That the house described in the schedule stands on a site in the *abadi* of village Arjunpur, Gaon Sabha Circle Arjunpur, Tehsil and district Meerut.

2. That on the coming into force of the U.P. Zamindari Abolition and Land Reforms Act, (Act 1 of 1951), the building and the site of the house mentioned above stood settled with Sri Rameshwar Singh, who was in possession thereof on the date of enforcement, i.e. 1st July, 1952.

3. That the said Rameshwar Singh left the village and abandoned the house and site mentioned above on the 8th September, 1962 and has not come back thereafter (*or*, that Rameshwar Singh died on 8th September, 1962, without leaving any heirs entitled to succeed him and the site and house escheated to the State).

(x) With the coming into force of U.P. Act No.1 of 1951, namely U.P. Zamindari Abolition and Land Reforms Act, all the interests of the intermediaries, namely, the zamindars have vested in the State of Uttar Pradesh. This includes wells, trees in *abadi* and buildings. Section 9 of the said Act provides that all buildings shall be deemed to be settled with the person in the possession thereof, by the State Government on such terms and conditions as may be prescribed. Rule 26 of the rules framed under the said Act provides that the building in *abadi* along with the area appurtenant thereto shall be deemed to be settled with the owner of the building on the following terms and conditions: (1) he shall have heritable and transferable

4. That the right of the State in the said *abadi* site and house vest in the plaintiff under notification No. H-560/2 dated 15th July 1952.

5. That after the abandonment by (*or*, death of) Rameshwar Singh, the defendant has entered into possession of the house and site on 15th December 1962, without any right.

6. That the plaintiff claims possession of the said site and house.

No. 69—Suit for Damages for Wrongful Disturbance by the Landlord or by his Subsequent Lessee

1. By a deed of lease dated November 24, 1994, the defendant (*or*, defendant No.1) let to the plaintiff an open space of land lying to the west of the Municipal hall in the town of Budaun, for the purpose of erecting a theatrical stage for a period of four months, at a monthly rent of Rs.1,000.

2. The plaintiff took possession of the said land on November 24, 1994 under the said lease, and was in possession up to November 30, 1994.

3. On November 30, 1994, the defendant took wrongful possession of the said land, and broke and removed the bamboos which the plaintiff had erected thereon for the purpose of making a stage pandal (*or*, on November 29, 1994, the defendant No.1 let the said land to the defendant No.2 who took the lease with notice of the plaintiff's lease. The said defendant No.2, on November 30, 1994, took wrongful possession of the said land and broke, etc.)

4. In consequence of the aforesaid acts, the plaintiff had to take other land from Ram Chandra on a rent of Rs.3,300 a month and has suffered damages.

Particulars :

Cost of bamboos Rs.1,000

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interest in the site; (2) he shall not be liable to ejectment on any ground whatsoever; (3) he shall have the right to use the site for any purpose whatsoever subject to the existing right of easement; (4) succession will be governed by personal law; (5) if the building is abandoned or if the owner dies without any heir entitled to succeed, the site shall escheat to the State; and (6) he shall pay to the Gaon Samaj rent for the site equal to the amount of rent payable therefor on the date immediately preceding the date of vesting, if any such rent was payable then. The rule further provides that a building in a holding or a grove shall be deemed to be settled with the tenure

Difference between the rent agreed to be paid to the defendant (*or*, defendant No.1) and the rent agreed to be paid to Ram Chandra for the other land, for three months and 24 days (the unexpired portion of the plaintiff's lease), at Rs.2,300 per month was Rs.8,740.

The plaintiff claims Rs.9,740, with interest from the date of suit to that of payment.

No. 70—Suit by Tenant Against Landlord, with Special Damage

(Form No. 19, Appendix A, C.P.C.)

1. On the ___ day of _____ 19__, the defendant, by a registered instrument, let to the plaintiff [the house No. ___, _____ Street] for the term of _____ years, contracting with the plaintiff, that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term.

2. *All conditions were fulfilled and all things happened necessary to entitle the plaintiff to maintain this suit.

3. On the ___ day of _____ 19__, during the said term, EF, who was the lawful owner of the said house, lawfully evicted the plaintiff therefrom, and still withholds the possession thereof from him.

4. The plaintiff was thereby [prevented from continuing the business of a tailor at the said place, was compelled to expend.....rupees in moving, and lost the custom of GH and JF by such removal].

The plaintiff claims _____ rupees, with interest at _____ percent from the ___ day of _____ 19__.

*[*This allegation is not really necessary, vide O.6, R.6, but is reproduced here as the form itself is set out in the Appendix A to C.P.C.*].

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holder on the same tenure as the holding or the grove in which it is situate. Under section 117 of said act all *abadi* sites shall vest in the Gaon Sabha established for the circle. In view of these provisions of law, a *ryot* cannot be ejected now from the *abadi* site on any grounds whatsoever except where he abandons it or dies without any heir.

LICENCE (y)

No. 71—Suit for Ejecting a Licencee and for Injunction

1. By a verbal agreement, on January 4, 1995, the plaintiff granted a licence to the defendant to occupy the house described below, and to take water from the well situate to the west of the said house, for a period of one month.

2. The defendant entered into possession of the said house under the said licence, on January 4, 1995, and has, since that date, been taking water from the said well.

3. The term of the licence expired on February 4, 1995, but the defendant is still in possession of the house and is still taking water from the well.

The plaintiff claims :

(1) possession of the said house.

(y) A licence is permission to do any act on the immovable property of the licensor, when such permission does not amount to the creation of an easement or transfer of an interest in the property. For distinction between a lease and a licence see, *Lal* v. *Dunlop Rubber Co.*, A 1968 SC 175; *Biswanath Panda* v. *Gadadhar Panda*, A 1971 Ori 115; *Sorab* v. *Viswanatha Menon*, A 1975 Ker 990; *Khaja Moinuddin Hasan* v. *Municipal Corporation of Hyderabad*, (1977) 1 An WR 329; *Govindbhai* v. *New Shorrock Mills*, A 1984 Guj 182.

A licence is revocable at the pleasure of the licensor, except in cases mentioned in section 60, Easements Act. A licence is revocable unless (1) it is coupled with a grant or interest, *or*, (2) the licensee acting on the licence has constructed work of permanent nature (*Ratha Behera* v. *Ram Ratan Goenka*, (1974)(1) CWR 216). It is also impliedly revoked in cases mentioned in section 62. No notice is necessary to revoke a licence (*Gobinda* v. Nandulal, 45 IC 317, 27 CLJ 523), and therefore, a suit for the ejectment of a licensee or for an injunction restraining the licensee from doing the acts for which licence was granted may be instituted without a previous notice. But a plaintiff may be deprived of his cost, if the licensee's plea be that he was prepared to leave the land or to desist from continuing to do the act and would have done so, had the licensor expressed a desire to revoke the licence. If however, the licence is revoked by expiry of the period for which it was granted, or on any of the other grounds mentioned in section 62, clauses (c), (f), (g), or (i), the licensee is not entitled to any notice and cannot even be exempted from costs of the licensor's suit. A licence is personal and in the absence of a different intention appearing it cannot be exercised by agents, servants, transferees or even heirs. On the death of

(2) A perpetual injunction restraining the defendant from taking water from the said well.

MASTER AND SERVANT *(z)*

No. 72— Suit by Servant for his Wages

1. The plaintiff was employed by the defendant as his Head Clerk and Accountant, under a verbal agreement, on August 1, 1994, at a monthly salary of Rs.3,200.

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the licensee the position of an heir is that of a trespasser or tenant at will (*Chinnan* v. *Ranjithammal*, 59 M 554, 131 IC 175, A 1931 Mad 216, 60 MLJ 709). One co-sharer cannot revoke a licence. Either all the co-sharers jointly revoke it or authorise one co-sharer to revoke it (*Hafiz Ali Khan* v. *Mohd Ishaq*, 1977 AWC 709, A 1977 All 469).

Where licence is revocable, the licensee is entitled to reasonable notice. If, however, the licence is revoked, the remedy is by way of damages and not by way of injunction if the licence is irrevocable and its enjoyment is obstructed by the licensor, the remedy of the licensee is either by way of injunction or damages. The Calcutta High Court seems, however, to hold that even in such cases the remedy will be one by way of damages (*Mohd. Ziaul Hasan* v. *Standard Vacuum Oil Co.*, 55 Cal 232; see also, *E.P. George* v. *Thomas John*, A 1984 Ker 224 on relief to be claimed).

Defence : If the defendant admits the licence, he cannot deny the plaintiff's title to the land, though he can plead that it has been extinguished after the grant of licence. He may plead that he has, acting upon the licence, executed a work of permanent character on the land and has incurred expenses in doing so, or that the licence was coupled with transfer of property which is still in force (action 60). A person makes constructions "acting upon the licence" when licence is granted for building purposes or where constructions are made for purposes necessary for the enjoyment of the licence. Even a *kutcha* building, if regularly kept in repairs, may be a work of permanent character (*Nasirul Zaman* v. *Azimulla*, 3 ALJ 765, 28 A 741; *Thakur Prasad* v. *J. Thomkinson*, 102 IC 26 Oudh; *Tripathi* v. *Jokhu*, 113 IC 757 All) but a licence granted to build a shed has been held to be revocable (*Sorab* v. *Viswanath Menon*, A 1975 Ker 990). The work must be done on the licensor's land which cannot be bound in perpetuity on account of any work done by the licensee on his own land (*Gujarat Ginning Co.* v. *Motilal*, 40 CWN 417, 1936 ALJ 145, 160 IC 837, A 1936 PC 77). He may claim reasonable time to leave the property or to remove his goods from it (section 63).

(z) The relation between master and a servant [excepting a public servant, a servant of a statutory corporation or of a body which though not statutory is an instrumentality of the State, or a workman or other servant whose conditions of service are regulated by statutory provisions (*Sukhdev* v. *Bhagatram*, A 1975 SC

2. During the period of the plaintiff's employment, the defendant several times falsely accused the plaintiff, in the office and in the presence of the assistant clerks and menial servants, of dishonesty, and, by his general humiliating treatment made the plaintiff's position intolerable. On June 20, 1995, the defendant sent a report to the police falsely accusing the plaintiff of dishonestly appropriating defendant's money. The charge was, on investigation, found by the police to be false.

The plaintiff claims Rs. 4,800 for his pay from June 1 to July 15, 1995 with interest from the date of suit to that of payment.

No. 73—Suit for Damages for Wrongful Dismissal

1. Under an agreement in writing, dated June 20, 1994, the plaintiff was employed by the defendant to serve him as his assistant, from July 1, 1994 at a monthly salary of Rs.7.500.

2. By the terms of the said agreement it was agreed that the plaintiff should be retained by the defendant in his service until the service should

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1331, (1975) 1 SCC 421) is regulated by the contract of service. The contract may provide any lawful terms. It is not illegal to provide that a servant would not leave the service without giving 15 days' notice (*Aryodaya* v. *Siva Virchand*, 13 BLR 19, 9 IC 348). If a man enters into any service, a contract to be bound by all the published rules of that service will be implied. In the absence of any contract to the contrary, contract of service is determinable by reasonable notice on either side. Generally a month's notice is considered sufficient (*Ralli Brothers* v. *Amulka Prasad*, 11 ALJ 104. 18 IC 699, 35 A 132), but it really depends on the circumstances of each case and nature of the service e.g., a Municipal Secretary and a school master have been held entitled to three months' notice (*Municipality of Tatta* v. *Assamal*, 29 IC 597 Sindh; *Nirod Chandra* v. *Kirtya Nanda*, A 1922 Pat 24 DB). In a case, a tutor was held entitled to six months notice (*Wittenbaker* v. *J.C. Galstaun*, 36 CLJ 256, 44 C 917, 43 IC 11), but a month's notice was considered reasonable in Burma in the case of a teacher employed by month (*Maung Thein* v. *J.P. De Souza*, 7 R 303, 119 IC 740, A 1929 Rang 167). If a servant is hired by month, fifteen days notice, is reasonable (*Ralaram* v. *Brij Nath*, 168 IC 697, 36 PLR 501). If a servant leaves without notice, he is not entitled to pay for the month preceding that in which he leaves (*Amar Singh* v. *Gopal*, A 1931 Lah 133, 132 IC 577). He is, however, justified in leaving the service if the master is guilty of any breach of contract, or any act or neglect on his part which is prejudicial to the safety, health or moral reputation of the servant (*Middleton* v. *Playfair*, A 1925 Cal 88 DB). According to English authorities, a servant, who leaves before the expiry of the fixed term of service, cannot get pay even for the period he has served. This strict rule has been followed in Bombay and Calcutta (*Aryodaya* v. *Siva Virchand*, 13

be determined by three month's notice given by the defendant to the plaintiff.

3. By a letter of June 10, 1995, the defendant, without giving the plaintiff any such notice as aforesaid, wrongfully dismissed from service.

4. At the time of such dismissal, there was due from the defendant to the plaintiff, pay for the month, of April and May, 1995.

The plaintiff claims :

(1) Rs.15,000, arrears of his pay.

(2) Rs.25,000, on account of damages.

Particulars of Damages

		Rs.
Pay from June 1 to 10	... ..	2,500
Three month's pay in lieu of notice	... ...	22,500
Total	.....	25,000

(3) Interest from the date of suit to that of payment.

No. 74—Like Suit, Another Form

(Form No. 15, Appendix A, C.P.C.)

1. On the ___ day of _____ 19__, the plaintiff and defendant mutually agreed that the plaintiff should serve the defendant as [*an accountant, or in the capacity of foreman or as the case may be,*] and that the defendant should employ the plaintiff, as such, for the term of [one year] and pay him for his services Rs.____(monthly).

2. On the ____ day of _____ 19__, the plaintiff entered upon the service of the defendant and has ever since been, and still is, ready and willing to continue in such service during the remainder of the said year whereof the defendant always has had notice.

BLR 19, 9 IC 348; *Dhumee* v. *Sevenoaks*, 10 C 80), but the Madras High Court has taken a lenient, and apparently more equitable view in holding that a servant leaving without excuse can recover his pay for the period he has served, less the master's damages for the contract (*Choklingam* v. *Mahomed Shariff*, 23 MLJ 680, 17 IC 894). An industrial workman can recover his wages through the speedier and cheaper remedy of an application to the prescribed authority under the Payment of Wages Act, 1936, and a suit is not required.

If a master dismisses a servant during the fixed term of service, or when no

3. On the ____ day of _____19__, the defendant wrongfully discharged the plaintiff and refused to permit him to serve as aforesaid, or to pay him for his services.

No. 75—Suit for Breach of Contract to Serve
(Form No. 16, Appendix A, C.P.C.)

1. On the ___day of _____19__, the plaintiff and defendant mutually agreed that the plaintiff should employ the defendant at an [annual] salary of Rs.___, and that the defendant should serve the plaintiff as [an artist] for the term of [one year].

2. The plaintiff has always been ready and willing to perform his part of the agreement [and on the ___ day of _____19__, offered so to do].

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term is fixed without a reasonable notice, he is liable for damages for wrongful dismissal. The measure of damages in such cases may be the pay for the unexpired period or for the period of a reasonable notice, or when a notice is provided in the agreement, the pay for the period of that notice (*Secretary of State* v. *Burrowes*, A 1937 Lah 549; *Gokak Municipality* v. *Raja Ram*, A 1940 Bom 386; *Tanjoi Bank* v. *G.N. Munia Swami*, A 1964 Mad 183). But the plaintiff must show that he was ready and able to render service during this period. Where a servant absented himself without leave and got an operation performed which incapacitated him for a period of over a month, and was dismissed, it was held that he could not claim damages for dismissal without notice (*Burma Oil Co.* v. *Narain Das*, 104 IC 185 Sind) A master can dismiss a servant without notice and even during the fixed period on the ground of misconduct, neglect of duty or incompetence (*Pandurang* v. *Jairamdas*, A 1925 Nag 166; *Ramsawami* v. *Madras Times*, 37 IC 655 Mad DB; *Piare Lal* v. *Sri Ram*, A 1936 Lah 581). If a dismissal is justified, pay of the broken period cannot be recovered (*Bhakta* v. *Seetal*, A 1925 All 680, 23 ALJ 282). A suit for arrears of salary by a government servant illegally dismissed lies against the Government concerned (*State of Bihar* v. *Abdul Majid*, A 1954 SC 245, 1954 SCR 786; *Om Prakash* v. *State of U.P.*, A 1955 SC 600, 1955 SRC 391).

When an apprentice is a minor living with his father and maintained by him, the father can bring a suit for his wages (*Muthuvelu* v. *Govindswami*, 117 IC 304, A 1929 Mad 781).

In a suit for damages for wrongful dismissal, facts showing that the plaintiff was entitled to remain in service, and that his dismissal was wrongful, must be alleged. In a suit for pay or wages, the contract should be alleged, and also how it terminated. If it is terminated by the plaintiff's own resignation, facts justifying the resignation must be alleged.

When a servant is not a servant of the Government or any Statutory body or Corporation or local authority and his employment is not governed by any statutory

3. The defendant (entered upon) the service of the plaintiff on the above mentioned day, but afterwards, on the __day of_____19__, he refused to serve the plaintiff as aforesaid.

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provision, his remedy for wrongful termination of the contract of employment is a suit for damages and not reinstatement (*Bool Chand* v. *Chancellor Kurukshetra University*, A 1968 SC 42; *Hindustan Steel* v. *P.J. Verghese*, 1967 ILR 47 Pat 13; *R. Pandubhai* v. *Management, Bombay Cycle Importing Company*, A 1970 Mad 476; *Chairman of Managing Committee, Smt Dev Kunwar Norelal Bhatt Vaishnav College for Women* v. *Alegama Thomas*, (1971) 1 MLJ 76). A public servant dismissed in contravention of Article 311 of the Constitution has to be reinstated. Industrial worker dismissed from service may be ordered to be reinstated by Labour Court or Industrial Tribunal; and a servant of a statutory body created under a Statute when it has acted in breach of mandatory obligation imposed by statute is also entitled to reinstatement. These are the three exceptions which are generally recognised (*T. Kadiryelu* v. *The Secretary Madras State Khadi & Village Industries Board*, (1972) 2 MLJ 641; *Principal & Secretary Maulana Azad College* v. *Nathooram Pandey*, 1972 MPLJ 779; *Sirsi Municipality* v. *Cecilia Kom Francis Tellis*, (1973) 1 SCC 409, A 1973 SC 855; *Sanllaran* v. *Deputy Registrar Cooperative Societies*, 1975 KLT 861; *Sukhdeo Singh* v. *Bhagatram*, A 1975 SC 133; *Arya Vidya Sabha Kashi* v. *Krishna Kumar Srivastava*, A 1976 SC 1073).

Limitation : for a suit for wages is three years (Article 7 Limitation Act 1963).

Defence : In a suit by a servant for his wages, the defendant may plead that the plaintiff was dismissed for misconduct or incapacity or neglect of duties, or that he left of his own accord and without any justification, hence he is not entitled to pay for the broken part of the month. In a suit for damages for wrongful dismissal, the defendant may deny the dismissal and plead that the plaintiff voluntarily withdrew from the service, or he may justify the dismissal by pleading misconduct, or incapacity or neglect of the plaintiff. But it is no defence to a suit for dismissal within a fixed term that the defendant's business was not improving or he could get another cheaper man (*Sundaram Chettiar* v. *Chocklingham Chettiar*, 1938 MWN 653, A 1938 Mad 672, (1938) 1 MLJ 857, 47 LW 803). All that is necessary is that the existence of the reason for dismissal on the date of dismissal must be shown. It is immaterial that the defendant did not know of them and dismissed the plaintiff on other grounds (*Sassoon* v. *Dossa Kalian*, 15 IC 757, 5 SLR 192). But where the dismissal is wrongful because the person dismissing the plaintiff was not competent to dismiss him, the fact that there were good reasons for dismissal can be no justification (*Venkata* v. *Ponnuswami*, 41 M 357, 33 MLJ 660, 43 IC 205).

Full particulars of the alleged misconduct or other facts showing justification must be given in the written statement. It is a sufficient defence if the facts justify the dismissal, and the question whether the Judge would have himself dismissed a servant on that ground is an irrelevant consideration (*The Madura, etc.*, v. *Sundaram*, A 1926 Mad 57, 49 MLJ 526, 91 IC 525). Disobedience of an order which is not lawful

MONEY SUITS *(aa)*

No. 76—Suits for Money Lent

1. On June 4, 1993, the defendant borrowed Rs. 4,000 from the plaintiff and agreed to repay the loan on demand (*or*, within six months), with interest at 12 per cent per annum; [*or*, from May 20, 1992 to June 4, 1993, the defendant borrowed money from the plaintiff on several occasions and agreed to repay it on demand, with interest at 12 per cent per annum.]

Particulars of the Loans

			Rs.
May 20, 1992	...	...	500
August 4, 1992	...	...	500
October 8, 1992	...	...	500

is not misconduct, e.g., refusal of a servant to go to a place where he is in danger of life (*The Ottoman Bank* v. *Chakrian* 124 IC 881, A 1930 PC 110).

If pay for the unexpired period of service is claimed as damages the defendant may plead that the plaintiff had opportunities to obtain other service during the period and he wrongfully refused to take other employment. If pay in lieu of notice is claimed, defendant may show that plaintiff had actually obtained equally advantageous employment (*Baldeo Singh* v. Sachdev, 151 IC 613, A 1934 Rang 107).

(aa) A suit for a simple money debt, if advanced on the security of a bond or other agreement, must be brought on the basis of such bond or agreement. Otherwise, it is a simple suit for money lent and **the fact of the loan, with the terms on which it was advanced, must be alleged in the plaint.** If the suit is within three years of the loan, an express promise of repayment need not be pleaded, as the same is implied in the request for the loan (*Pramatha* v. *Dwarka*, 23 C 821). If the plaintiff has kept a memorandum of the debt or has entered it in his account books, the fact need not be alleged in the plaint, as that is only an evidence of the loan. Even if there is acknowledgment of the loan in the defendant's hand in the plaintiff's *bahi khata*, it need not be alleged in the plaint, though it would be an excellent piece of evidence at the trial. It has already been shown that if the acknowledgment is accompanied by a promise, it can be made the basis of a suit and should then be pleaded (*see* "Account stated").

Limitation : Three years from the date of loan under Articles 19 and 21. But if money is repayable at a specified time Article 113 will apply and time will run from the date fixed for payment. If an agreement provides that debtor can repay in three years and the debtor makes default, suit brought within three years of expiry of time

November 10, 1992	...	...	100
January 12, 1993	...	...	1,000
March 14, 1993	...	...	400
June 4, 1993	...	...	1,000
		Total	4,000

2. The defendant has not made any payment [*or*, the defendant has not made any payments except the following :—]

Particulars of Payment

* * *

The plaintiff claims Rs. ____, with interest from the date of suit to that of payment.

Particulars of the Amount Claimed

* * *

No. 77—Like Suit, Another Form

(Form No. 1, Appendix A, C.P.C.).

1. On the __ day of _____ 19__, plaintiff lent the defendant Rs.___ repayable on the __day of _____19___ .

2. The defendant has not paid the same, except ____ rupees paid on the ___day of _____19 __.

[*If the plaintiff claims exemption from any law of limitation, say:*]

3. The plaintiff was a minor [*or*, insane] from the __ day of till the ___ day of _____19___.

The plaintiff claims ___rupees, with interest at ___ per cent from the __ day of _____ 19__.

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granted for repayment is not barred (*Shatzadi Begum Saheba* v. *Girdharilal Sanghi*, A 1976 AP 273). If money is lent by cheque, under Article 20, three years period will run when the cheque is paid.

Defence : Defendant may show that the debt is not recoverable because it was advanced for an immoral or illegal purpose, or there might be a dispute about the terms of the loan if the loan is admitted.

MONEY PAID *(bb)*

No. 78—Suit for Money Paid for the Defendant at his request

1. At the request of the defendant made verbally on December 20, 1994, the plaintiff paid Rs.500 to one Kishan Lal on December 21, 1994.

2. The defendant had, at the time of making the request, undertaken to pay the money to the plaintiff in six months from the date of payment with interest at 12 per cent per annum.

(bb) When the plaintiff has paid any money to a third person at the request, or by the authority of the defendant, express or implied, with an undertaking, express or implied, to repay it, the plaintiff can bring a suit for its recovery. The liability is entirely personal and no charge is created on the property in respect of which money is paid (*Munni* v. *Triloki*, A 1932 All 332, 136 IC 66, 1932 ALJ 63, 54 A 140). Examples of an implied authority to pay are furnished by section 69 and 70 of the Contract Act. When the plaintiff was either compelled to pay, or was legally compellable to pay, or was interested in paying money for which the defendant was liable, the plaintiff can sue the defendant for it. For instance, if the plaintiff's property is attached in execution of a decree against the defendant and the plaintiff pays the decretal amount, he can recover it from the defendant (*Tulsa* v. *Jageshwar*, 28 A 563). Similarly, he can recover what he has to pay under O. 21, R. 89, to save his property from sale in execution of decree against the defendant (*Apparao* v. *Venkata*, A 1941 Mad 635). Similarly, a mortgagee discharging a rent decree against the mortgagor (*Jhanku* v. *Revati*, 19 ALJ 73), a mortgagee paying revenue of the mortgaged property (*Ma Mya* v. *Ma Lon*, A 1933 Rang 112, 144 IC 392), a Hindu widow incurring costs on the funeral of her husband (*Dalel* v. *Ambika*, 25 A 266), and a sub-lessee paying rent due from the lessor (*Mathoora* v. *Kitso Kumar*, 4 C 369), may recover the money so paid, even though he may be entitled to other remedies, e.g., to add the money to mortgage money. But if the plaintiff was not interested in paying the money nor was he compelled to pay it, the payment is voluntary one, then the money paid cannot be recovered. The plaintiff should have a present interest and not an expectant interest. For example, a person who expects to get possession as the result of a pending litigation cannot be said to be a man interested in the property (*Nand Kishore* v. *Paraoo*, 2 Pat LJ 676, 42 IC 839). It is, however, not necessary that a person to be interested in payment should at the same time have legal proprietary interest in the property, in respect of which payment is made (*G G Seksaria* v. *The State of Gondol*, 1950 ALJ 270 PC; *Chentilnathan Peri* v. *S P Manickam Chettiar*, A 1966 Mad 426).

The payment should have been actually made before a suit is brought and an undertaking given for the money is not enough to entitle the plaintiff to bring a suit. Even if a person is neither interested nor compelled to make a payment he can recover it if he had made it *lawfully for the defendant*, and the latter has enjoyed the

3. The defendant has not paid the money or any part thereof.

The plaintiff claims Rs.500 principal and Rs.60 interest, with interest from date of suit to that of payment.

No. 79—Suit for money payable by the Defendant, paid by the Plaintiff (Section 69, Contract Act)

1. In execution of the decree No. 545 of 1991, passed by this court against the defendant, the decree-holder, Ramlal, attached the plaintiff's house in village Barka, Pargana Moth, District Jhansi on September 20, 1995.

2. On September 30, 1995 the plaintiff paid into court to the credit of the said Ramlal, Rs.4,564, on account of the amount of the said decree due from the defendant, in order to have the plaintiff's house released.

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benefit of the payment (section 70), for example, payment of debts made *bona fide* by minor defendant's uncles who were supervising the defendant's business (*Muthayya* v. *Narayanam*, A 1928 Mad 317, 109 IC 101 DB). The basis of a suit under section 70 being contractual, a minor cannot be made liable under that section as a liability which cannot be imposed by express contract cannot be imposed even by implied contract (*Bankey Behari* v. *Mahendra*, A 1940 Pat 324, 188 IC 772). But if the payment was not made lawfully, e.g., when it was made voluntarily without any legal obligation to pay or in spite of the protest of the person on whose behalf it was made, it cannot be recovered (*Venkata* v. *Aruna Chalam*, 51 IC 857 Mad; *Radhakrishna* v. *Secretary of State*, A 1936 Mad 930). A payment made with a view to create evidence in support of a claim hostile to the defendant cannot be said to be made lawfully for the defendant (*Jinnat Ali* v. *Fateh Ali*, 15 CWN 332, 13 CLJ 640, 9 IC 219).

If money is left with a vendee to pay to a creditor of the vendor and the vendee pays more than what was left with him, the payment cannot be said to have been made lawfully (*Suraj Bhan* v. *Hashim*, 40 A 555, 16 ALJ 581). Section 70 gives statutory recognition to the doctrine that a person who had been unjustly enriched at the expense of another must make restitution. The extent to which restitution is to be made by the person who is unjustly enriched is merely the excess of benefit received over the harm suffered by him (*De Semet India Pvt. Ltd.* v. *B.P. Industrial Corporation (P) Ltd.*, A 1980 All 253; *Mahabir Kishore* v. *State of M.P.*, A 1990 SC 313, see also *Aries Advertising Bureau* v. *C.T.Devaraj*, A 1995 SC 2251; *Union of India* v. *I.T.C. Limited*, A 1993 SC 2135). If the defendant was not bound to make the payment no suit can lie against him; for instance a trespasser cannot be sued for money paid by another on account of the Zamindar's due as the former was not bound to pay it (*Payida* v. *Barrey*, A 1926 Mad 152, 91 IC 608).

The fact that the defendant was benefited is not enough, if the circumstance be such that he had no option to accept or reject the benefit. For instance, A believing

The plaintiff claims Rs. 4,564 with interest from the date of suit to that of payment.

himself to be the reversioner of B, deposits the amount of a decree against B and has the sale set aside. It is found in suit between A and C that C and not A, is the reversioner, A cannot recover the amount paid by him on the ground that C is benefited by the release of the property, as the payment was made by A at that time, not for C, but on his own behalf (*Yogambai* v. *Naina*, 33 M 15). But where work, was done by the plaintiff under a contract which has not been validly executed and defendant had taken the benefit, he was made liable (*P.D. Khanna* v. *Secretary of State*, 38 PLR 618; *State of W.B.* v. *B.K. Mondal*, A 1962 SC 779; *New Marine Coal Co.* v. *Union of India*, A 1964 SC 152; *Mulchand* v. *State of M.P.*, A 1968 SC 1218). Where work was done under requisition by Government on suggestions by defendant, but defendant making it clear that he would not pay for the work, it was held that work was not done for the defendant (*Governor General* v. *The Municipal Council, Madura*, A 1949 PC 39, 1948 ALJ 462). Government of India supplied steel to a Company for manufacturing gas plants. Stock was subsequently transferred on the instructions of Government of India to a third person. Government of India was held to have enjoyed the benefit (*Union of India* v. *J.K. Gas Plant*, A 1980 SC 1330). A contractual liability by defendant to pay the money, which plaintiff, with a view to protect his own interest, has to pay would also entitle plaintiff to be reimbursed and it is not necessary that the liability under section 69 should be statutory (*Agne Lal* v. *Sidh Gopal*, A 1940 All 214, 1940 ALJ 20, 189 IC 60).

In any suit for money paid for the defendant, plaintiff must allege **(1) payment by him, (2) defendant's request, express or implied, to make the payment, and (3) an undertaking, express or implied, by the defendant to repay money. In cases of implied request or undertaking facts implying the same should be alleged,** e.g., those showing (1) that the plaintiff was interested in making it or was acting lawfully in doing so, and (2) that defendant was bound to make the payment or that he voluntarily enjoyed the benefit of it. It is not in every case in which a man had benefited by the money of another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit there must be an obligation, express or implied, to repay (*Lala Manmohan Das* v. *Janki Prasad*, A 1945 PC 23 (30), 1945 ALJ 51).

Limitation : Three years from payment of money (Article 23).

Defence : The defendant may plead that the payment was voluntary, or that he was neither bound to make it nor was he benefited by it, nor had he requested for it nor did he ratify the payment. In a case under section 70, he may plead that the payment was not made *for him lawfully*, or that it was made by the plaintiff for his own benefit, and incidentally, the defendant was also benefited (*Viswanadha* v. *Orr*, 45 IC 786 Mad), or that the defendant had no option but accept the benefit and the benefit was thus forced upon him. Stamp and registration expenses advanced to a company which never commenced its business are not recoverable under section 70, Contract Act from the Company having regard to section 103(3) of the Companies Act, 1913 (*In re, Ambica Textile Ltd.*, 54 CWN 157).

MONEY RECEIVED *(cc)*

No. 80—Suit for Money when it was Paid for a Consideration which has Failed

1. On February 14, 1994 the plaintiff requested the defendant, who was proceeding to Bombay to buy for him a video cassette recorder and paid Rs.11,000 in advance to the defendant for payment of the price.

2. On February 20, 1994 the plaintiff verbally asked the defendant not to purchase the said recorder for him, and the defendant replied that he would not.

3. The defendant has not refunded the sum of Rs.11,000 or any part thereof.

The plaintiff claims refund of Rs.11,000 with interest from date of suit to that of payment.

No. 81—Like Suit, Another Form

1. On August 6, 1972, the defendant borrowed Rs.1,10,000 from the plaintiff at an interest of one percent per mensem and executed on her own behalf and on behalf of her minor nephew Hashim Ali, a mortgage-deed for the said loan hypothecating two houses situated at _____.

2. For two years after the mortgage the defendant continued to pay interest on the aforesaid loan but did not pay any interest after that nor did she pay any part of the principal amount.

3. The plaintiff thereupon instituted a suit against the defendant and her said minor nephew Hashim Ali under her guardianship and obtained a decree from this court on April 10, 1978, for the principal mortgage money, interest and costs, to be realised by sale of the said mortgaged houses.

(cc) Under this head fall claims technically known **as claim for money had and received to the use and benefit of the plaintiff**, for instance, money received by defendant on behalf of the plaintiff, money paid by mistake of fact, money paid for a consideration which has failed, money paid under coercion, or recovered by fraud, or for an illegal object which has not been fulfilled, or overcharge made by a Railway Co. (*Palghat Electric Corporation* v. *Veeraraghav*, A 1941 Mad 439) or money stolen by defendant from the plaintiff (*Gaffar Khan* v. *Syed Noor*, A 1941 Mad 391). **The plaintiff must clearly set out in the plaint fact from which it can be inferred that the defendant received the money for his use from the plaintiff.** In the case given in precedent No.82, the plaintiff can recover money on the ground that

4. The said houses were sold in execution of the decree referred to in para 3 above and were purchased at the auction sale by one Manik Chand on May 20, 1980.

5. The said Manik Chand obtained possession of the said houses, and sold them to the plaintiff by a sale deed dated July 15, 1980 and the plaintiff obtained possession of the said houses on July 20, 1980.

6. In or about April, 1982 the aforesaid Hashim Ali through his father as next friend, instituted in this court a suit (being suit No.218 of 1982) against the plaintiff to set aside the sale of the aforesaid houses and for a declaration that the mortgage of August 6, 1972 was not binding on him. The suit was dismissed by this court but was decreed on appeal by the High Court on February 19, 1983 on the ground that the defendant had no authority to mortgage the said houses or to represent the said minor in the suit on the mortgage.

7. The said Hashim Ali has, in execution of the said decree of the High Court, dispossessed the plaintiff of the said houses on April 3, 1983.

8. The plaintiff claims refund of the sum of Rs.1,10,000 advanced to the defendant with interest at 1 per cent per mensem on the ground that the consideration on which it had been advanced has failed on February 19, 1983 when the High Court set aside the mortgage and the decree obtained upon it and the sale held in execution of the said decree.

The plaintiff claims :

(1) Judgment for Rs.1,10,000 for principal and Rs. ____ for interest from August 6, 1974, when the defendant ceased to pay interest, upto July 20, 1980, when the plaintiff obtained possession of the said houses.

(2) Interest from date of suit.

No. 82—Suit for Refund of Money Obtained by Fraud

1. On September 20, 1993 the plaintiff lent to the defendant a sum of Rs.22,000 on the defendant executing a bond for the said loan

it was obtained by fraud (*Shabazad* v. *Narain*, 101 IC 257 All). Where a transfer is set aside under section 53, Transfer of Property Act, the transferee can recover the price from the transferor (*Parasharam* v. *Sadasbeo*, A 1936 Nag 268). If a contract stands frustrated the party who had received benefit under it is liable to return it to

hypothecating his rights in the following plot of land :—

* * * *

2. In order to induce the plaintiff to advance the aforesaid loan and to agree to accept the security of the aforesaid plot of land as sufficient, the defendant verbally represented to the plaintiff that he was proprietor of the said plot.

3. The plaintiff was induced to, and did, advance the aforesaid loan to the defendant on the aforesaid security, by, and on the faith of, the said representation of the defendant and without knowledge of the true facts.

4. The plaintiff has since discovered on February 20, 1994 and the fact is, that the said representation was false and that the defendant is not the proprietor of the aforesaid plot of land hypothecated by him but that he had only a licence in it.

5. The defendant made the said representation fraudulently, well knowing that it was false.

The plaintiff claims refund of Rs.22,000 with interest from date of suit to that of payment.

No. 83—Suit for Money Paid under Mistake *(dd)*

1. The plaintiff and one Ram Kishan owed Rs.500 to the defendant under a bond, dated June 15, 1994, jointly executed by them.

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the other, vide section 65 (*I.F.C.I. v. Sehgal Papers*, A 1986 P & H 21; *State of Rajasthan v. Association of Stone Industries*, A 1985 SC 466).

Suit by auction purchaser against decree holder for recovery of money paid by him for purchase of property in auction is not maintainable as the principal of "money had and received" is not applicable (*Vishwanath Maharudra Matkari v. Jan Mohammed*, A 1982 Bom 30).

Limitation : Three years from the date when the money is received (Article 24), but when money is claimed back on the ground of failure of consideration, the time is three years from the date of failure of consideration (Article 47). The suit in precedent No. 81 was held to be governed by Article 97 of the Act of 1908 corresponding to Article 47 Limitation Act 1963 and could be brought within three years from the decree setting aside the sale in favour of the plaintiff (*Ma Hnit v. Fatma*, 101 IC 414, 52 MLJ 579 PC)

(dd) Under section 72, Contract Act payment made under mistake of fact can be recovered, when the mistake is in respect of the underlying assumption of the contract or transaction or is fundamental or basic (*Norwhich Union Fire Insurance*

2. On April 16, 1995, the said Ram Kishan paid Rs.500 to the defendant in full discharge of the aforesaid debt.

3. The plaintiff was not aware of the said payment by the said Ram Kishan, and in ignorance of the fact, paid Rs.500 to the defendant on April 20, 1995 in the belief that the said debt was still due.

4. The plaintiff came to know of the payment by Ram Kishan in the last week of May, 1995.

The plaintiff claims refund of Rs.500 with interest from the date of suit to that of payment.

No. 84—Money Overpaid

1. On January 4, 1996 the defendant verbally agreed to sell and the plaintiff agreed to buy the several gold ornaments detailed at the foot of the plaint at Rs.4,350 per 10 grams of gold contained in them.

2. The plaintiff and the defendant got the said ornaments weighed by Ram Kumar goldsmith, who declared them to contain 400 grammes of gold, and the plaintiff accordingly paid Rs.1,74,000 to the defendant.

3. On March 3, 1996, the plaintiff discovered, and the fact is, that the ornaments really contained only 340 grammes of gold and he was ignorant of this fact when he made the said payment.

4. The defendant has not repaid the sum so overpaid.

Society v. *W.H. Price*, 151 IC 548, 1934 ALJ 609, A 1934 PC 171). Tax paid to a board under the mistaken belief that property was situate within Board's jurisdiction can be recovered under this section (*Audi Narayana* v. *Panchayat*, A 1940 Mad 660).

While money paid under mistake of law is refundable, it would not be so, if a mistake of law of both parties had led to the formation of contract, and money was paid under the contract, because the contract is not voidable and it would not be possible to say that money was paid under mistake of law (*Ananyalakshmi Rice Mills* v. *The Commissioner of Civil Supplies*, A 1976 SC 2243, (1976) 3 SCR 387; also see, *Bhavnagar Salt Works* v. *Union of India*, A 1985 Guj 21 FB.).

The mistake must be as between the payer and the payee and not as to any collateral matter, e.g., if a bank cashed a cheque under the mistaken belief that it has funds, it cannot recover the amount from the payee (*Chambers* v. *Miller*, 32 LJCP 30; *China and Southern Bank* v. *Te Thoe Seng*, A 1926 Rang 14 DB). A payment made under a mistake of fact common to both parties can be recovered as money had and received to the use of the person making payment (*Tom Boeney Banett* v. *African Products Ltd.*, A 1928 PC 261).

The plaintiff claims the sum of Rs.26.100 paid to the defendant in excess of the true price, with interest from date of suit to that of payment.

No. 85—Like Suit, Another Form

(Form No. 2, Appendix, C.P.C.)

1. On the __ day of _____ 19__, the plaintiff agreed to buy and the defendant agreed to sell ____ bars of silver at ___ annas per tola of fine silver.

2. The plaintiff procured the said bars to be assayed by *EF* who was paid by the defendant for such assay, and *EF* declared each of the bars to contain 1,500 tolas of fine silver, and the plaintiff accordingly paid the defendant _____ rupees.

3. Each of the said bars contained only 1,200 tolas of fine silver, of which fact the plaintiff was ignorant when he made the payment.

4. The defendant has not repaid the sum so overpaid.

The plaintiff claims _____ rupees with interest at _____ per cent from ___ day of _____, 19__.

The mistake should be expressly alleged with particulars. When in a suit it was alleged that the contract price was not as entered in the contract deed but was really less, it was held that these allegations did not disclose any cause of action (*U. Shew Thang* v. *U. Kyaw*, A 1930 Rang 12).

Limitation : Three years from the date the mistake becomes known to the plaintiff (Article 113). In *Munnalal* v. *State of Punjab*, A 1986 P&H 59, the date of judgment in which the recovery was declared to be illegal was held to be the date of discovery of the mistake (relying on, *D Cawasji & Co.* v. *State of Mysore*, A 1975 SC 813). In *Bhavnagar Salt Works, supra*, Article 24 was applied to a suit for refund of tax illegally recovered as the plaintiff had paid it not under mistake but under compulsion knowing that it was not due.

Defence : It is a good defence that a long interval of time has elapsed during which the position of the defendant has been altered; and the plaintiff has, by his conduct, e.g., not informing the defendant of the mistake after detecting it, made it impossible for the parties to be restored to their original position (*Raghunath* v. *Imperial Bank*, 27 BLR 1129, 91 IC 342, A 1926 Bom 66 DB).

MORTGAGE*

No. 86—Suit by a Mortgagee for Sale or Foreclosure *(ee)*

1. The plaintiff is mortgagee of the property sought to be sold (*or*, foreclosed).

2. The following are the particulars of the mortgage :

(a) Date - March 6, 1970.

(b) Name of mortgagor- Puran Chand

Name of mortgagee- Sham Lal.

(c) Sum secured - Rs.44,000.

(d) Rate of interest - Twelve per cent per annum with annual rests.

(e) Property subject to mortgage— House No. 460, Mahatma Gandhi Marg, Ferozabad, bounded as follows: (*boundaries*).

(f) *Amount now due* :- Rs.54,479 as per account given at the foot of the plaint.

3. The said Puran Chand died in 1981, leaving three sons, Kishen Chand, defendant No.1, Gopi Chand, defendant No.2, and Fakir Chand.

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*The law of mortgage is so vast that it is useless to make an attempt to deal with it in the small space of these foot-notes. When there is a complicated case of mortgage, the law should be carefully studied by the pleader before drafting the plaint.

(ee) A suit for sale can be brought under a simple or an English mortgage, though a mortgagee is always at liberty to sue for a simple money decree (*Chinnaswami* v. *Kanniah*, 1937 MWN 1215 (1), 46 LW 728). Even if a simple mortgagee is himself in possession under another usufructuary mortgage he can bring a suit for sale subject to his usufructuary mortgage (*Udaichan* v. *Nagina*, 50 IC 40 Pat; *Nazirum* v. *Asifa*, 100 IC 577 All; *Rangaswami* v. *Subbaraya*, 30 M 408; contra *Bhagwandas* v. *Bhagwani*, 26 A 14). A usufructuary mortgagee or a conditional mortgagee can bring a suit for sale only when there is a personal covenant to pay the money and also the property is hypothecated for the money, for a mere covenant to pay does not give a right to sue for sale but only gives right to a personal decree (*Kanhiaya Prasad* v. *Hamidan*, 176 IC 492, A 1938 All 418; *Kamal* v. *Ram Narayan*, A 1930 Pat 152, 120 IC 308; *Mohammad Abdulla* v. *Mohammad Yasin*, A 1933 Lah 151, 141 IC 377; *Ramlal* v. *Mt. Genda*, A 1942 All 236 contra. *Ramayya* v. *Gurwa*, 14 M 232; *Siva* v. *Gopala*, 17 M 131). Whether there is such a covenant or not has to be gathered from the deed itself.

Fakir Chand also died a few months later, leaving a minor son, Balram, defendant No.3.

4. After the said mortgage, Kishen Chand and Gopi Chand, defendants Nos.1 and 2 have sold a share in the property to defendant No. 4 and have mortgaged another share to defendant No.5.

5. On January 20, 1981, defendant No.6 has, in execution of a simple money decree against defendant No.3, purchased a half-share out of the one-third share of defendant No.3 in the mortgaged house.

6. Defendant No.7 is a prior mortgagee of the house in suit under a bond, dated May 4, 1968, but the plaintiff's mortgage in suit has priority even against the mortgage of defendant No.7, by reason of the fact that the money under the mortgage in suit was left with the mortgagee Shamlal for paying off a prior mortgage of one Ram Narayan, dated March 18, 1966, and the said Shamlal redeemed the said mortgage of Ram Narayan on March 18, 1970.

7. Shamlal, the mortgagee, died in 1982, leaving two sons, Ram Lal defendant No. 6 and Motilal. Moti Lal has executed a sale-deed in favour of the plaintiff on September 4, 1984, in respect of his half share in the mortgagee rights under the mortgage in suit.

The plaintiff claims :

(1) Payment of Rs.54,479 with interest from date of suit to that of payment, or in default (sale, or) foreclosure (and possession) of the property detailed in para 2 (e) above.

A prior mortgagee in not a necessary party to such a suit and, the property is always sold subject to his mortgage but the court may with his consent, sell the property free from his mortgage (O 34, R.12). If a puisne mortgagee has priority over the plaintiff's mortgage in respect of a portion of his mortgage money, the plaintiff can sell property only after payment of such portion to the puisne mortgagee. If the plaintiff admits this partial priority in the plaint, he must offer to redeem the mortgage to that extent, and he will have to pay court-fee for such redemption also. If he does not admit the priority, and the court finds that a puisne mortgagee has priority to a certain extent, the court will pass a decree directing payment of the prior charge.

In the suit for redemption, unless it is a conditional sale or anomalous mortgage so long as the sale is not confirmed, the debtor has a right to deposit the entire sale money including the sale expenses and poundage fee and the Court is under the Statutory duty to accept the payment and direct redemption of mortgage (*New Kemil Worth Hostels (P) Ltd.* v. *Ashoka Industries Ltd.*, (1995) 1 SCC 161).

(2) In case the proceeds of sale are found to be insufficient for the amount due under the decree, then, that liberty be reserved to the plaintiff to apply for a decree for the balance under O. 34, R. 6, C.P.C.

No. 87—Like Suit, Statutory Form

(Form No. 45 Appendix A, C.P.C.)

1. The plaintiff is mortgagee of lands belonging to the defendant.

2. The following are the particulars of the mortgage :

(a) (*Date*) ;

(b) (*Names of mortgagor and mortgagee*) :

In a plaint for sale, foreclosure or redemption full particulars of the mortgage must be given as shown in the forms in Appendix A, C.P.C. To these particulars should be added, in the case of a suit for redemption, the conditions, if any, laid down in the mortgage deed for redemption. But the allegations about transfers or devolution of the rights of the mortgagor or mortgagee should not be mixed in the particulars as in the C.P.C. forms. These should be separately but briefly made. It would be convenient first to state the transfers and devolutions of the rights of the mortgagor in their chronological order, and then to state those of the mortgagee in the same order. If the description of the mortgaged property had changed owing to settlement or partition, the changed description should also be given in the plaint, after the description given in the mortgage deed separating the two by such words as "At present corresponding to" or "which has, at the partition on (*or* settlement) held after the mortgage, become."

An account of the "money due" should be separately given at the foot of the plaint as particulars, mentioning any payments, or credit given for the profits if the plaintiff is in possession of the mortgaged property. In such cases, a paragraph should be added to the plaint in the following form: "The plaintiff has (*or* the plaintiff and his predecessors-in-title have) been in possession of the mortgaged property since June 20, 1981, and particulars of the profits received during the period of such possession, and credited in favour of the mortgagee, are given in the account at the foot of the plaint."

One of the several mortgagee can sue for his share of the mortgage money, but he must make the co-mortgagees defendants if they refuse to sue (*Sunitabala* v. *Dhara Sundari*, 46 IA 272, 53 IC 131). In such cases decree should direct deposit by the mortgagor realisation by sale of the whole sum due, out of which plaintiff can be paid his share. Court-fee should in such cases be paid on the whole sum due and not only on the plaintiff's share (*R. Kailasa Ayyar* v. *Payyabir*, A 1942 Mad 205). A suit by one of several co-mortgagees to recover the amount due under the mortgage by sale of the mortgaged property without impleading the other co-mortgagees is not maintainable. The defect is not cured if the other co-mortgagees are added after

(c) (*Sum secured*) ;

(d) (*Rate of interest*) ;

(e) (*Property subject to mortgage*) ;

(f) (*Amount now due*) ;

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the expiry of the period of limitation (*Adivepa Channappa* v. *Radappa Ballappa*, A 1948 Bom 211 FB).

A usufructuary mortgagee has right to possession of the mortgaged property and has the right to receive the rents and profits accruing from it (*Narpatchand A Bhandari* v. *Shantilal Mool Shamakr Jani*, A 1993 SC 1712). A tenant inducted by the mortgagee in possession is liable to be evicted on redemption of the mortgage, the tenant is not entitled to the protection of the provisions of the Rent Control Law (*Jadavji Purshottam* v. *Narsibhai*, A 1987 SC 2146; *Om Prakash Garg* v. *Ganga Sahai*, A 1988 SC 108; *Pomal* v. *Tarajilal* A 1989 SC 436). A mortgagee in possession is landlord, he is entitled to seek recovery of possession of the leased premises from a tenant in mortgaged premises for his own bonafide requirement of use (*S.B. Abdul Azeez* v. *Maniayappa Setty*, A 1989 SC 553).

Parties :- See Chapter XII.

Limitation : Twelve years under Article 62 from the due date of payment. If payment by instalments is provided, limitation would run from the date of each default (*Gokul* v. *Sheo Prasad*, A 1939 Pat 433 (FB); 183 IC 523). If option is given to mortgagee to sue for whole on occurrence of any default, time does not run on default if option is not exercised (*Megh Nath* v. *Collector, Cawnpore*, A 1947 All 7, 1946 ALJ 315, following, *Lasa Din* v. *Gulab Kumar*, A 1932 PC 207). In a suit for redemption of usufructuary mortgage, where mortgage is acknowledged in a certain deed, limitation would start from the date of acknowledgment in the deed (*Bibijan* v. *Murlidhar*, (1995) 1 SCC 187). Acknowledgment of liability after expiration of prescribed period for filing suit does not revive period of limitation under section 18 of the Limitation Act (*Sampuran Singh* v. *Niranjan Kaur*, A 1999 SC 1047).

Court fees: In cases of foreclosure valuation for jurisdiction and court-fees is the amount of the principal mortgage money (section 7 (ix)]. In case of sale, it is the total amount of principal and interest claimed by the plaintiff.

Defence : The defendant may show that the transaction does not amount to a hypothecation of the property or that the so-called mortgage-deed is defective and does not therefore operate as such, e.g., that it was not attested by two witnesses. That the mortgage money was left by the mortgagor with a subsequent transferee for payment to the plaintiff is no defence. If a puisne mortgagee is impleaded, he may show that he has discharged some mortgage prior to that of the plaintiff and thus obtained priority to that extent. But a person impleaded as subsequent mortgagee cannot plead his paramount title, i.e., that he and not the mortgagor was the owner of the property (*Gobardhan* v. *Mannalal*, 16 ALJ 639; but see, *Bisheshwar Dayal* v. *Jafri Begum*, 1937 ALJ 536 DB); where it has been held following *Radha Kishun* v. *Khurshed Hossein*, A 1920 PC 81, 47 Cal 662 that there is nothing in O.34, R.1,

(g) (If the plaintiff's title is derivative, state shortly transfers or devolution under which he claims).

(If the plaintiff is mortgagee in possession, add—)

The plaintiff took possession of the mortgaged property on the ___ day of _____, 19__, and is ready to account as mortgagee in possession from that time.

The plaintiff claims :

(1) Payment, or in default [sale *or*] foreclosure [and possession].

(Where Order 34 Rule 6, applies)

(2) In case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff, then that liberty be reserved to the plaintiff to apply for an order for the balance.

No. 88—Like Suit where Members of a Joint Hindu Family are Impleaded *(ff)*

After setting out the facts as in precedent No. 87 add :

1. The said mortgagor and defendants Nos.1 and 2 are and on the date of the mortgage were, members of a joint Hindu family, and the said

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which prohibits the mortgagee from impleading in the mortgage suit any person who, he alleges, impugns his title as a mortgagee. To hold otherwise would in many instances lead to highly undesirable and inequitable results. There is no reason in law or equity for holding that the question of prior transferees' paramount title should not be decided in the mortgage suit. The Oudh Court has held in *Mehdi Ali* v. *Walayat*, A 1930 Oudh 97, that a mortgagee should not be allowed in his suit to raise a controversy as regards the title of third person, not connected with the mortgage and claiming a paramount title. A person having a paramount title is not a necessary party to the suit (*Nimba Ganba* v. *Narain Paikaji*, A 1948 Nag 369). If impleaded, he may apply to be discharged. If he does not so apply and an issue is framed and decided about his rights, the decision becomes binding on the parties (*Mst. Satwati* v. *Kali Shankar*, A 1955 All 4). The Calcutta High Court has held that the court has a discretion to entertain or refuse to entertain such a plea (*Asmatullah* v. *Gamir*, 33 CWN 659, A 1929 Cal 672 DB). The same view has been taken by Madras High Court (*State Waqf Board* v. *Indian Bank Limited, Madras*, (1976) 2 MLJ 314). An auction purchaser can impeach a mortgage made by the judgment-debtor whose rights he has purchased (*Jagannath* v. *Chunilal*, A 1933 All 180, 1933 ALJ 1110, 143 IC 736).

(ff) If the property mortgaged was the self-acquired property of the mortgagor, no other member of the family should be impleaded in a suit for sale or foreclosure.

mortgagor was at all material times the head and manager of that family.

2. The mortgaged property was the ancestral property of the mortgagor.

3. The mortgage was made by the said mortgagor to raise money for payment of government revenue of the family *zamindari* property in village Randewa for the years 1946 and 1947. [*Or, if defendants 1 and 2 are mortgagor's sons*, the mortgage was made in lieu of (*or*, to pay off) antecedent debts of the said mortgagor. *Particulars of the antecedent debts.*] [*Or*, (*if the mortgagor was not the father*) the mortgage was made by the said mortgagor as manager of the joint family to pay off an antecedent debt, viz. debt due on a bond, dated January 6, 1949 to one

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If any one is impleaded, the suit is bad against him for want of a cause of action. It is only when the property is joint family property, in which other members of the family besides the mortgagor have also an interest, that such other members should be joined. In such cases, **all facts making the mortgage binding on such members should be pleaded**, viz. that the mortgagor was the manager of the family, that the mortgaged property was joint family property, the necessity for which the mortgage was made, or the benefit which family derived from it, or the antecedent debt for payment of which it was made, or that the mortgagee had made, *bonafide* inquiries into the alleged necessity of the mortgage and was satisfied that the mortgage was justified by necessity. In the last case it is immaterial that the alleged necessity did not actually exist (*Ram Krishna* v. *Ratanchand*, 1931 ALJ 458, 1931 MWN 733, 33 BLR 988, 35 CWN 841, A 1931 PC 136, 132 IC 613). If the antecedent debt was not the debt of the father, but of any other member acting as manager, the necessity of such debt should also be alleged. When the plaintiff relies on inquiries it is better to allege both the actual necessity as well as, and in the alternative, the inquiries about that necessity, so that if actual necessity is not established the plaintiff can fall back on his inquiries.

If, however, the other members were neither born nor were in their mother's womb when the mortgage was made, and the mortgagor was the only member of the family then in existence, and allegation to that effect may alone be made and it is not necessary to allege the necessity for the mortgage. So also, if the mortgage was made with the consent of the other members, then in existence. But, in the latter case, unless the consent of the other members then in existence can be easily established, it will be safer to allege the necessity also as an alternative case.

If the plaintiff is not sure whether the property is self acquired property or ancestral property of the mortgagor, he can put forward an alternative case, and may then join other members and make all the allegations of necessity, etc.

The mortgagee may, however, if he so likes, not implead other members of the family and may bring a suit against his mortgagor alone. In such cases no allegation

Ram Bilas, and taken by the said mortgagor to pay off a decree for arrears of rent which had been passed in respect of the family holdings].

4. Further, and, in the alternative, few days before the mortgage it was represented by the said mortgagor that he required the loan to pay off arrears of government revenue of village Randewa for the years 1946 and 1947, and the plaintiff (*or*, the said Sham Lal mortgagee) made inquiries from the village patwari Ram Lal and satisfied himself that the said representation was true.

Relief same as in precedent No. 87.

No. 89—Like Suit when Mortgage made by Certificated Guardian

After setting out the facts as in precedent No. 87 add :

1. The defendant was on the date of the said mortgage a minor and one Pratap Singh who had been appointed by the court of District Judge, Delhi, by order dated _____, as the guardian of his property executed

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of necessity, etc., need be made as the mortgagor cannot plead want of authority in him to make the mortgage. In such cases the decree will be binding on the whole family, if the circumstances show that the defendant was the manager and the property involved was joint family property (*Ramnathan* v. *S.R.M.M.C.T.M. Firm*, 168 IC 731, A 1937 Mad 345). In such cases it is always better to allege that the mortgagor is sued in his capacity as manager though mere omission to do so will not make the decree less binding on the whole family (*Pirthipal* v. *Rameshwar*, 99 IC 154, 3 OWN 954). If, in such a case, any other member of the family, who is not impleaded wishes to challenge the mortgage, he must, without delay, make an application to be made a defendant. If he does not and a decree is passed against his father, he may find it difficult to have the decree set aside, for it has been held in *Gauri Shanker* v. *Jang Bahadur*, 79 IC 1008; *Nandlal* v. *Umrai*, A 1926 Oudh 321 and *Lal Singh* v. *Jagraj Singh*, 26 ALJ 229, that he will not be able to do so without proving that the mortgage was made for illegal or immoral purposes. But see observations, which are of course *obiter*, in *Sukh Lal* v. *Murari Lal*, 1 Lucknow 160, A 1926 Oudh 273 DB, that a son can have the question of legal necessity tried in a separate suit (See *"Suit by or against a joint family" in Chap* XII). See also *Kira Lal* v. *Puranchand*, A 1949 All 685 (FB), where it has been held that if the managing member of the joint undivided estate is the father, he may, by incurring debt, whether simple or mortgage debt, as long as it is not for an immoral purpose lay the estate open to be taken in execution proceedings upon a decree for payment of that debt.

Defence : The defendants may plead that they and the mortgagor were separate, or that the mortgagor was not the manager of the family. They may deny

the said mortgage on behalf of the defendant under permission of the said court granted by its order dated _____ for the purpose of discharging the debt of the defendant particularised below.

Particulars :

2. Alternatively, if the said permission be held to be ineffective or invalid, the plaintiff claims restitution of the money advanced by him on the ground that the defendant's estate has been benefited by the discharge of the debts particularised in the preceding paragraph.

Relief same as in precedent No. 87.

Add the following prayer also :

Alternatively, the plaintiff claims Rs._____ by way of restitution.

No. 90—Suit for Redemption with Allegations of Satisfaction *(gg)*

1. The plaintiff is the mortgagor of (*or*, transferee of mortgagor's rights in) the property sought to be redeemed.

(2) The following are the particulars of the mortgage :

(a) to (e) as in precedent No. 87.

(f) Nothing is now due.

(g) *Condition of Redemption*— Mortgagor may redeem at any time on payment of what is due.

3. The said mortgagor sold his rights and interest in the said mortgaged property to the plaintiff by a sale-deed, dated April 6, 1995.

3. (*or* 4). The defendant has been in possession of the mortgaged property since the date of the mortgage and it was agreed by the terms of

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the allegations of necessity and may plead that in any case, there was no necessity for the high rate of interest stipulated in the mortgage deed. Unless a definite plea that the particular debt was incurred for immoral or illegal purposes is taken, it is needless to make general allegations of immorality of the mortgagor.

(gg) As to who is entitled to redeem, *see* section 91, Transfer of Property Act. Ordinarily the whole mortgage money should be paid. A plaintiff is not entitled to claim partial redemption on payment of a proportionate sum, unless the integrity of the mortgage has been broken by the mortgagee (*or*, all the mortgagees) acquiring a share of the mortgaged property. Under section 60 of the Transfer of Property Act, the integrity of a mortgage is broken only if the mortgagees have acquired in whole or in part the share of mortgagor (*Shiva Harakh Raj* v *Akbar Ali*, 1947 ALJ

the said mortgage that the net profits of the said property should be first applied to the payment of interest, and surplus should be applied to the liquidation of the principal.

4. (*or* 5). The plaintiff claims that the whole mortgage money has been satisfied by the profits of the property, and that there is a surplus of Rs. 4,000 in the defendant's hands, but if the court finds any sum still due to the defendant, plaintiff is ready and willing to pay it.

The plaintiff claims :

(1) Redemption of the said property without any payment, or on payment of any sum the court may, on account taken from the defendant, find to be due, and possession of the same.

(2) Rs. 4,000 or any other sum found due on account of the surplus, with interest at 16% per annum or at such rate as the court may deem reasonable.

No. 91—Suit for Sale by an Equitable Mortgagee*

1. On the ___ day _____19__, the defendant borrowed Rs.____ from the plaintiff agreeing to repay the same with interest thereon at 12% per annum within 3 years.

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244). In such cases each mortgagor can redeem his own share only and cannot redeem the whole (*Zaibun-nissa* v. *Maharaj Prabnu Narain*, 39 A 618). In all such cases he must make the other co-mortgagors parties to the suit (*Ahmed Husain* v. *Md. Qasim Khan*, A 1926 All 46 DB, 24 ALJ 88, 90 IC 80; *Durga Prasad* v. *Chamr*, A 1940 All 528). But the fact that the mortgagee has allowed one mortgagor to redeem his share does not entitle other mortgagors to redeem their shares piecemeal but any other mortgagor must redeem the whole (*Shah Ram Chand* v. *Prabhu Dayal*, A 1942 PC 50). A single suit should be brought for redemption of the whole mortgage, and even the fact that the mortgagee rights in different portions of the property, have been transferred to different persons will not justify separate suits against such persons (*Purshotam* v. *Isub*, 104 IC 648, 29 BLR 1052).

Full particulars of the mortgage with conditions, if any, laid down in the deed for redemption must be alleged, also offer of the money due. If there has been previous tender of the mortgage money, it should be alleged in the plaint, as the mortgagee's right to interest ceases and the plaintiff becomes entitled to profits of the mortgaged property from that date. If there has been no previous tender, an offer to pay the mortgage money should be made in the plaint itself. A suit cannot be dismissed merely for want of a previous tender (*Raghunandan* v. *Raghunandan*, 19 ALJ 573 FB). If no money is due, there should be an allegation to that effect.

*No writing is required to create such a mortgage but usually a memo is

2. At the time of taking the loan defendant deposited with the plaintiff the following documents of his title to the property mentioned at the foot of the plaint with intent to create a security on the said property for the repayment of the said loan (and immediately after the completion of the transaction executed a memorandum to that effect, which is annexed to the plaint).

Particulars of the Documents

3. The defendant has not paid anything towards the said loan and Rs._____ is now due on account of principal and interest.

Prayer: (*Same as in the case of suit for sale on simple mortgage*).

No. 92—Suit for Redemption

(Form No. 46, Appendix A, C.P.C.)

1. The plaintiff is mortgagor of lands of which the defendant is mortgagee.

2. The following are the particulars of the mortgage :

(a) (*Date*);

(b) (*Name of mortgagor and mortgagee*);

(c) (*Sum secured*);

(d) (*Rate of interest*);

(e) (*Property subject to mortgage*);

(f) (*If the plaintiff's title is derivative, state shortly transfers or devolution under which he claims*).

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drawn up. If the memo is intended to be the mortgage it is inadmissible without registration, and oral evidence would be inadmissible (*Hari Ram* v. *Kedarnath*, A 1939 PC 167), but if the memo is only an evidence of a completed transaction, it is admissible (*Ram Sarup* v. *Shiva Dayal*, A 1940 Lah 285).

The plaintiff may claim that the mortgage has been satisfied by the usufruct of the property and no money is due, and may in the alternative, offer to pay whatever the court might find to be due, and this is the safest course to adopt in all cases in which satisfaction is alleged. It has been held in Bombay that a redemption suit without such offer is bad and should be dismissed (*Purshotam* v. *Vanat*, A 1943 Bom 259, 45 BLR 489). Any balance left in the mortgagee's hands after satisfaction of the mortgage debt should be claimed with interest. On mortgagee's obligation to keep accounts see *Shadilal* v. *Lal Bahadur*, (1933) 1 AWR 291 PC; *Mohd Ishaq* v. *Rupnarain*, 1931 ALJ 977 FB).

(If defendant is the mortgagee in possession, add)

3. The defendant has taken possession, [*or*, has received the rents] of the mortgaged property.

The plaintiff claims to redeem the said property and to have the same reconveyed to him and have possession thereof together with mesne profits.

No. 93—Like Suit, after Tender of Mortgage Money

1. The plaintiff is the mortgagor of the property sought to be redeemed.

2. The following are the particulars of the mortgage:

(a), (b), (c) and *(e)* as in No.87.

(d) Rate of interest— Nil. Profit of mortgaged property to be taken by defendant in lieu of interest.

(f) Amount due— Rs.4,000.

(g) Condition of redemption— Mortgagor may claim redemption, in the month of *Jeth* any year, on payment of the principal sum.

3. On May 20, 1994, in the month of *Jeth* the plaintiff deposited Rs.4,000 for the defendant in court, along with an application under section 83, Transfer of Property Act.

4. The defendant was served with a notice of the said deposit on _____, in the month of *Jeth*, but he did not appear to accept the tender on the date fixed by the court, which was July 4, 1994. The money is still in deposit.

The plaintiff claims :

(1) Redemption of mortgage and possession of the mortgaged property.

If money is not paid under a preliminary decree for redemption another suit for redemption can be brought so long as a final decree extinguishing the right of redemption is not passed, the right can always be enforced (*Joti Lal* v. *Sheodhayan Pd.*, 163 IC 908, A 1936 Pat 420).

Limitation : Thirty years under Article 61(a), Limitation Act, 1963.

Court-fees : The court-fee payable is an *ad valorem* fee on the principal money secured by the mortgage but valuation for purposes of jurisdiction in case mortgagee is in possession and the plaintiff sues for possession, should be the

(2) Rs.150, on account of mesne profits of the property for one year, i.e., from July 4, 1994 upto date, as per details given below.

(3) Future mesne profits upto the date of delivery of possession at the same rate.

Details of Mesne Profits

	Rs.
Gross rental	290
Government Revenue...	140
Total ...	150

No. 94—Suit for Partial Redemption

1 and 2 as in the last precedent.

3. The defendant No.1 has by a sale-deed executed on the ____ and registered on the ____, acquired the 1/5th share of defendant No.5 in the mortgaged property, and the plaintiff, therefore, claims redemption of his 1/5th share only on payment of the proportionate mortgage money.

4. (*3 and 4 as in precedent No.93 substituting Rs.800 for Rs. 4,000*).

The plaintiff claims :

(1) Redemption of the mortgage and possession of his 1/5th share of the mortgaged property.

(2) and (3) *as in last precedent substituting 30, 58 and 28 for 150, 290 and 140 respectively*).

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value of the land (*Ma Hla Saing* v. *Na Suwe*, 5 R 499,105 IC 412). No additional court-fee will be required even if surplus money is claimed as being due on taking account (*Chhiddu* v. *Jhanjhan Rai*, 45 A 154, 79 IC 303, A 1923 All 26 DB; *Mt. Wajidbegum* v. *Abdulgani*, 113 IC 34 , A 1929 Nag 1). A doubt was expressed about this in *Vasudeva* v. *Madhava*, 16 M 329.

Defence : The defendant, though admitting his possession as a mortgagee, may deny the specific mortgage sought to be redeemed, as the plaintiff can redeem only the specific mortgage on which he sues (*Gawri Shankar* v. *Lala*, A 1938 Oudh 16, 171 IC 437) He may deny a previous tender, as, although want of a valid previous tender is not fatal, yet it may affect the question of interest and costs, if the defendant has no other objection to the suit.

The defendant may deny his possession for the period alleged by the plaintiff, and the amount of profits received by him, if they were to go in liquidation of the principal also.

No. 95—Suit by a Mortgagee for Mortgage Money or for Possession *(hh)*

1. The defendant No.1 usufructuarily mortgaged the property detailed below to the plaintiff, by a mortgage deed, dated the 19th June, 1993, for a consideration of Rs.2,000 and put the plaintiff in possession from July 1, 1993.

Details of the Property

* * *

2. The defendant No.1 by the deed, dated June 20, 1995, mortgaged with possession the said property to defendant No.2.

3. Under colour of the said mortgage in his favour, defendant No.2 dispossessed the plaintiff of the mortgaged property on July 4, 1995.

The plaintiff claims:

(1) Possession of the property.

(2) Rs.80 on account of mesne profits for one year from defendant No. 2, as per account given below.

(hh) Every mortgagee, in whose mortgage there is a personal covenant to pay, can forego his mortgage security and sue for a personal decree for the mortgage money, provided, the claim is within limitation. Limitation in such cases used to be six years in the case of registered bond, and three years in case of an unregistered bond (*Ma Pua* v. *Ma Me Tha*, 161 IC 462, A 1936 Rang 80), but is only three years under the Act of 1963. When the mortgage is defective and cannot be enforced as mortgage, a suit for a personal decree can be brought upon it if there is a covenant to pay. Even a suit for sale can, on detection of such a defect, be amended by addition of a prayer for a simple money decree.

A suit for mortgage money will lie at the instance of the mortgagee, even when there is no personal covenant to pay, in cases referred to in clauses (b) and (c) of section 68, Transfer of Property Act. In such cases court has no power to insist on the plaintiff filing a suit for sale, even if he can do so (*Chinnasami* v. *Kannia*, A 1938 Mad 132, (1937) 2 MLJ 920, 171 IC 593). The decree will be personal in the case of a purely usufructuary mortgage, but in a case of a combined usufructuary and simple mortgage the plaintiff may claim a decree for sale (*Narsingh Partap* v. *Mohd Yaqub*, A 1929 PC 139, 116 IC 414, 56 IA 299). If a bond, however, contains a clause of hypothecation in case of dispossession or disturbance, a suit for sale may be brought on the basis of such clause and the limitation will then be twelve years.

Interest may be claimed though not provided for in the bond, under the Interest Act. In fact, when a plaintiff is kept out of possession, he must get interest

(3) In the alternative, Rs.2,000 principal and Rs.160 interest from July 4, 1995 up to date, at the rate of 1 per cent per mensem with further interest from date of suit to that of payment, from defendant No.1.

NECESSARIES OF LIFE *(ii)*

No. 96—Suit for Necessaries of Life Supplied to Wife

1. Defendant No.1 is the wife of the defendant No.2.

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on his money (*Sitanath* v. *Thakurdas*, 46 C 448; see also, precedents and notes under (r) ante). Where a usufructuary mortgagee granted lease of the property to the mortgagor at an annual rent equal to interest, non-payment of rent was held to be equivalent to non-payment of interest so as to give the mortgagee a right to sue for principal and interest due on the mortgage, and the defence that the mortgagee should sue for rent under the lease was over-ruled (*Chaitan Prakash* v. *Mumtaz Ahmad*, 1937 ALJ 1171, 172 IC 63, A 1937 All 762).

In a suit under clause (a) of section 68, Transfer of Property Act, the plaintiff has simply to allege that the defendant covenanted to repay the mortgage money. In a claim under clause (b), he should allege (1) the fact of his having been deprived of the security, and (2) the wrongful act or default of the mortgagor which resulted in such deprivation. In a claim under clause (c) the plaintiff must allege (1) that he was entitled to possession and (2) either, that the mortgagor failed to deliver it, or that his possession was disturbed by the mortgagor or any other person, and (3) if it was disturbed by any other person how was the mortgagor responsible for such disturbance as a dispossession by a mere trespasser does not make the mortgagor liable (*Nakchedi* v. *Ram Charitar*, 19 A 191).

To a suit for mortgage money may be added an alternative prayer for possession, and *vice versa*. If in a suit for possession against the mortgagor, the plaintiff omits to claim recovery of mortgage money he cannot bring a suit for that afterwards (*Ram Autar* v. *Shanker Dayal*, 90 IC 622, A 1926 Pat 87). If the plaintiff has been dispossessed by a third person, even though at the instance of the mortgagor, and he wants to sue for possession only and not for money he should sue the trespasser alone and the mortgagor is not a necessary party.

Court-fee in a suit for possession is calculated on the principal amount of the mortgage money. If interest is also claimed, an additional fee is payable on its amount. In an alternative suit such as in precedent No. 95, fee on the higher relief, viz., on the amount claimed as principal and interest, is payable.

Defence: In a suit under clause (a), the defence which are available in a suit on a simple money bond may be raised. In other suits, the legality of the mortgage may be attacked, or it may be pleaded that the plaintiff did not himself take possession, or gave up possession or intentionally procured his dispossession by colluding with a third person.

(ii) A suit for recovery of the price of necessaries of life supplied to a person

2. Defendant No.1 is living with defendant No.2 and her children and is managing the family affairs and has been doing so at all material times.

3. Between Sept. 20, 1992 and August 25, 1994 defendant No.1 purchased certain goods from the plaintiff. Particulars of the goods purchased with the prices are given at the foot of the plaint.

4. The said goods were articles of food necessary for defendants and their family and suitable to the position of the family.

The plaintiff claims Rs.____being the price of the said goods with interest from the date of suit.

No. 97—Suit for Necessaries Supplied to Wife Living Separately

1. Defendant No.1 is the wife of defendant No.2 and was until the 2nd October 1993 living with him.

2. On the 2nd October 1993 defendant No.2 without any cause or justification, expelled her from his house (*or*, defendant No.1 by reason of the cruelty of defendant No. 2 was compelled to leave the house of defendant No. 2) (*Particulars of Cruelty*).

3. Since the 2nd October 1993 defendant No.1 has been living apart from defendant No.2 and defendant No.2 has refused to provide her maintenance.

4. After the said date defendant No.1 ordered from the plaintiff and the plaintiff has sold and delivered to her, goods on credit, particulars of which are given at the foot of the plaint.

5. The said goods were necessary for the maintenance of defendant No.1 according to her position in life.

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who cannot contract, such as a minor or a person of unsound mind, is recognised by section 68, Contract Act and lies against the minor's property. Similarly, a suit will in some cases lie against a husband for necessaries supplied to a wife on account of the legal duty of the husband to maintain his wife and the consequent implied agency of the wife to pledge the credit of her husband for such purposes (*E.T. Robinson* v. *R.V. Rigg*, A 1936 All 393, 160 IC 874, 1936 ALJ 50), though unlike the case in England, he is not ordinarily liable for her debts. If she lives apart from the husband without any justification the husband will not be liable even for necessaries supplied to the wife but if her separate living is justified, e.g., by husband's cruelty, husband would be liable. It is safe to implead the wife and claim

The plaintiff claims Rs._____on account of the price of the said goods with interest from date of suit, from defendant No.2 and in the alternative from defendant No.1.

NEGOTIABLE INSTRUMENTS *(jj)*

No. 98 —Suit on a Bill of Exchange by Endorsee against Acceptor

1. On September 20, 1995, at Agra, one Sham Lal, by his bill of exchange directed to the defendant, required the said defendant to pay to one Ram Lal Rs. 4,000 on demand.

2. On September 30, 1995, the defendant accepted the said bill of exchange.

3. The said Ram Lal endorsed the same to one Sri Lal and the said Sri Lal endorsed it to the plaintiff.

4. The defendant has not paid the same.

The plaintiff claims:

Principal	... ...	4,000
Interest	... ...	260
	Total	4,260

(2) Interest from date of suit to that of payment.

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a decree against her in the alternative.

Defence Husband may plead that he has been supplying necessaries himself and the wife did not need anything or that she has no justification for living separately from him or that he had warned the tradesman that he would not be responsible.

(jj) This term includes a promissory note, bill of exchange, or cheque payable to order or bearer. Even if such a note or cheque is payable to a particular person, it is presumed to be payable to his order unless it contains words expressly or impliedly showing an intention that it shall not be transferable (section 13, Negotiable Instrument Act). A document not containing an unconditional promise to pay, or not specifying person to whom money is payable, is not a pronote (*Narbada Prasad* v. *Mt. Sunki*, A 1938 Nag 464, 177 IC 889; *Brij Kishore Rai* v. *Lakhan Tewari*, A 1978 All 44).

It is only a person who comes into possession of a negotiable instrument having paid consideration for it and being a *bona fide* transferee that can be a holder in due course within the meaning of section 9. Section 9 implies and

No. 99—Suit by Payee Against Drawer for Non-Acceptance

1. On September, 20, 1995, at Agra, the defendant by his bill of exchange directed to Ram Lal, required the said Ram Lal to pay to the plaintiff Rs. 4,000, twenty-one days after sight.

2. On September 30,1995, the same was duly presented to the said Ram Lal for acceptance and was dishonoured.

3. On October 22,1995, the plaintiff by a letter of the same date gave notice of the said dishonour to the defendant, but the defendant has not paid the amount of the said bill.

Prayer as in previous precedent.

No. 100—Suit by an Endorsee against his Endorser for Non-Payment

1. The defendant endorsed to the plaintiff a bill of exchange now overdue purporting to have been made by one Sham Lal on September 20, 1995, at Agra requiring one Ram Lal to pay to the order of the defendant Rs.4,000, twenty-one days after sight, and accepted by the said Ram Lal on September 30, 1995.

2. On October 21, 1995, the same was presented to the said Ram Lal and was dishonoured.

3. *As in previous precedent.*

Prayer as in precedent No. 98.

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contemplates that there must be a negotiation or transfer to the holder in due course by some one who had the authority to transfer or negotiate the negotiable instrument. The transfer and the negotiation must be of a negotiable instrument, and not of an inchoate document which is not negotiable instrument under the Act (*Tara Chand Kewal Ram* v. *Sikri Brothers*, 55 BLR 231). The person signing the hand note is the person actually liable, and no evidence is admissible to prove that it was executed on behalf of an undisclosed principal (*Promod Kumar Pati* v. *Damodar Sahu*, A 1953 Ori 179).

In a suit on a promissory note it is not necessary to aver consideration or to prove it. The court places the burden upon the defendant to prove want of consideration. But in a case where the plaintiff does not rely upon the promissory note *per se* but pleads certain facts in his plaint which militate against the presumption naturally arising from the document, the presumption will be displaced by the act of the plaintiff himself. Where, therefore, the plaintiff has himself shown that the date and sum which the promissory note bore were not the date on which it was executed

No. 101—Suit by an Endorsee against Drawer, Acceptor and Endorser

1. On September 20, 1995, at Agra, Ram Lal, defendant No.1, by his bill of exchange now overdue directed to Sham Lal, defendant No.2, required the said Sham Lal to pay to the order of Sri Lal, defendant No.3, Rs.4,000, twenty-one days after sight.

2. On September 30, 1995, the said Sham Lal, defendant No.2, accepted the same.

3. The said Sri Lal, defendant No.3, endorsed the same to the plaintiff.

4. On October 21, 1995, the same was presented to the said Sham Lal, defendant No.2, for payment and was dishonoured.

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and the sum which was actually handed over, it is not possible to take recourse to the presumption contained in section 118 (a) and (b), Negotiable Instruments Act as the plaintiff has deprived himself of the presumption by pleading facts contrary to what would be presumed (*Ful Chand* v. *Laxmi Narain*, A 1952 Nag 308 DB). The presumption is rebuttable. It can be rebutted by direct evidence or even by circumstantial evidence and once it is rebutted the burden of proof shifts back to the plaintiff (*Beni Madhab Nath* v. *Juvandra Nath Narman*, A 1979 Gau 46). The presumption is not available when the negotiable instrument is obtained by fraud or by commission of offence (*Alopi Prasad* v. *Harish Chandra*, A 1973 All 368).

A cheque is a negotiable instrument. Its negotiability can be destroyed only if it is marked as "not negotiable" on its face (*Durga Shah Mohan Lal* v. *Governor General- in - Council*, 1951 ALJ). A promissory note payable on demand can be endorsed (*Doongar Mal Kissan Lal* v. *Shambhu Charan*, A 1951 Cal 55).

A promissory note or bill of exchange, payable on demand, is payable at once, while one payable on a specified date becomes due on the third day after that day, and if the later day is a public holiday under the Negotiable Instruments Act, the instrument falls due on the next preceding business day (section 25), and no action can lie on such an instrument before the day on which it falls due.

A bill of exchange and a pronote must be presented for acceptance in cases in which it is so required by section 61 and 62, and must be presented for payment as required by section 64. A promissory note payable on demand and not payable at a specified place need not be presented for payment. But a *Hundi* not payable at a specified period after date or sight but made payable on the same day is not governed by section 66 and should be presented within a reasonable time (*Firm Harnam Singh* v. *Firm Nikha Ram*, A 1938 Lah 183). Want of presentment exempts the endorser (*Benaras Bank* v. *Piryа Das*, A 1930 All 160).

The plaint in suit on a negotiable instrument must show its date, amount

5. On October 22, 1995, the plaintiff by letters of the same date, gave notice of dishonour to each of the defendants, but none of the defendants has paid the amount of bill.

Prayer as in precedent No.98.

No. 102—Suit by Endorsee of Cheque against Endorser

1. On September 20,1995, one Sham Lal drew a cheque for Rs.4,000 on the State Bank of India, Lucknow Branch, payable to one Ram Lal or order.

2. The said Ram Lal endorsed the said cheque to one Sri Lal, and the said Sri Lal endorsed it to the defendant and the defendant endorsed it to the plaintiff.

3. On October 20, 1995, the plaintiff presented the said cheque for payment at the State Bank of India, Lucknow Branch, but the same was dishonoured.

4. On October 21, 1995, the plaintiff, by a letter of the said date, gave notice of the said dishonour to the defendant but, the defendant has not paid the amount of the said cheque to the plaintiff.

Prayer same as in precedent No. 98.

No.103—Suit by Bearer or Endorsee of a Crossed Cheque against Drawer

1. On September 20,1995, the defendant drew a cheque upon Grindlays Bank, Calcutta, for Rs.4,000 payable to Sham Lal or bearer (*or*, order)

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and parties thereto. It must allege whether the defendant is the maker, or the acceptor or the endorser of the instrument. If the defendant in a suit on a bill or a cheque is the drawer or the endorser **the fact that a notice of dishonour was sent or facts relied on as excusing the giving of such notice must be alleged in the plaint** (*Frubauf* v. *Grosvernor and* Co., 61 LJQB 717), for the giving of this notice is not a mere condition precedent but is a necessary element in the plaintiff's cause of action, as no party can be made liable unless such notice was sent to him, except when such notice is unnecessary under section 98. Notice may be oral or written, and may be in any form but it must be given within a reasonable time. In cases of foreign bills and when an acceptor for honour is to be charged, notice of protest should be sent instead of a notice of dishonour (section 102), and the fact should be alleged in the plaint. In other cases, even if the dishonour has been noted and

2. The said cheque before presentment for payment was crossed generally under the provisions of the Negotiable Instruments Act, 1881.

3. The plaintiff became the bearer of the said cheque (*or*, the said cheque was endorsed by the said Sham Lal to the plaintiff).

4. On October 5,1995, the said cheque was duly presented for payment by the State Bank of India, Calcutta, at the said Grindlays Bank and was dishonoured.

Para 5 (as para 4 of the previous precedent).

Prayer as in precedent No.98.

No. 104—Suit on a *Hundi* (by a Payee)

1. The defendant drew a *hundi* on January 10,1994, in favour of the plaintiff on the firm Lachmi Narian Panna Lal of Kanpur, for Rs.1,000 payable 21 days after date.

2. The plaintiff presented the said *hundi* to the said firm Lachmi Narain Panna Lal at their place of business at Kanpur, after maturity, but the said firm refused to honour or accept it.

3. A notice of dishonour was sent by the plaintiff to the defendant by post on February 5,1994.

The plaintiff claims Rs.1,000 principal and Rs.40 interest at the usual rate of 6 per cent per annum, with further interest from date of suit to that of payment.

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notice of protest sent, the facts need not be alleged.

The fact of the presentment or dishonour must also be alleged, where presentment is required, as in such cases presentment gives the cause of action. In cases mentioned in section 76 no presentment is necessary and none need be alleged. In a suit against the drawer presentment need not to be alleged (*Phul Chand* v. *Ganga Ghulam*, 21 A 450). If the drawer and the drawee are one person, presentation is not necessary (*Pachkaurilal* v. *Mulchand*, 44 A 554, 20 ALJ 437, A 1922 All 279 DB, 66 IC 503; *Shankardas* v. *Dittumal*, 99 IC 875, 8 LLJ 604).

The plaintiff may claim interest at the contractual rate from the date of suit to that of realisation (section 79). When no interest is mentioned in the instrument, the plaintiff is entitled to charge interest, not under the Interest Act, 1839 (now Act of 1978) but under section 80, Negotiable Instruments Act, at 6 per cent (now 18 per cent) per annum (*Pala Ram Gupta* v. *Harish Chander Jain*, (1974) 76 PLR 235).

In the case of promissory note payable on demand, no demand is necessary to charge the maker and none need be alleged in the plaint as the money under such

No. 105—Suit on a *Hundi* (by an Endorsee)

1. The defendant No.1 drew a hundi on January 10, 1996 addressed to the firm Lachmi Narain Panna Lal of Kanpur for Rs.1,000, payable to defendant No.2 or order, 21 days after date.

2. Defendant No.2 endorsed the said hundi to the plaintiff.

3. *As in para 2 of the last precedent.*

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a promissory note is immediately payable (*Meghraj* v. *Johnson*, 11 NLR 189; *Sk. Jamu* v. *Muhammad Ibrahim*, A 1926 Nag 194; *Framroz* v. *Mohamed Essa*, A 1926 Bom 241, 28 BLR 41 DB), but in the case of one payable at specified time, demand must be alleged.

Parties: Any holder can sue all the prior parties in his own name. The suit may be brought by an agent, or by a principal on pronote executed in the name of the agent (*Devichand* v. *Col. Sir Raja Jaichand*, 90 IC 1047), or by an assignee, for the fact that a pronote is transferable by endorsement does not prevent its transfer by assignment (*Surath* v. *Narayan*, 150 IC 925, 61 C 425, A 1934 Cal 549, 28 CWN 465; *Motilal* v. *Punjaji*, A 1933 Nag 160, 144 IC 411; contra, *B.S. Bhagwan Singh* v. *Backeshi Ram*, A 1933 Lah 494; *Jailal* v. *Jagmohan*, A 1937 Oudh 405, 168 IC 922). A payee of a cheque has no cause of action against the banker on whom the cheque is drawn (*Punjab National Bank* v. *Bank of Baroda*, A 1941 Cal 372; *U.P. Union Bank* v. *Dina Nath Raja Ram*, A 1953 All 637). A member of joint Hindu family can sue on an instrument endorsed in his name without joining other members. If a pronote is in favour of a joint family firm, individual members composing the family at the time of the execution can sue (*Madhubai* v. *Vadi Lal*, 181 IC 808, A 1939 Bom 147), or even the adult members at the time of suit who are capable of giving a valid discharge on behalf of the family (*Damel* v. *Man Mohan Das*, A 1940 Bom 164, 188 IC 618). A reversioner cannot be sued on an instrument executed by a Hindu widow (*Ramaswami* v. *Sellatami Lal*, 4 M 375; *Dhiraj* v. *Manga Ram*, 19 A 300), but the Bombay and Calcutta High Courts hold contrary view (*Rameshwar* v. *Provaboti*, 20 CLJ 23; *Sankrabhai* v. *Magan Lal*, 26 B 206), nor can a master be sued on a pronote executed by the servant (*Lallu Ram* v. *The Deputy Commissioner, Kheri*, 165 IC 578 (2), A 1937 Oudh 65). An agent signing a pronote on behalf of principal can, by appropriate words, exclude his personal liability (section 28); but a trustee cannot do so (*P. Bala Venkatram* v. *Marutha Mulhu*, A 1943 Mad 247).

As provisions of Sec. 4 of the Indian Negotiable Instrument Act indicates, in order that a document may fall within the definition of "promissory note", it must confirm to the following conditions viz. (1) it should be in writing, (2) it must contain an unconditional undertaking by the maker of the document, (3) such unconditional undertaking must be to pay certain sum of money only, (4) that such undertaking to pay certain sum of money must be to a certain person or to the order of that person or to the bearer of the instrument.

4. A notice of dishonour was sent by the plaintiff to the defendants by post on February 5, 1996 (*or,* the defendant No.1 had, before the maturity of the said hundi, countermanded payment, and was not therefore entitled to notice of dishonour. Such a notice was sent by post to the defendant No.2 on February 5,1996).

Prayer as in the previous precedent.

Every prior party is liable to a holder in due course until the instrument is satisfied. The maker and the acceptor are respectively liable as principal debtors and other parties as sureties. A subsequent surety can be impleaded in the same suit (*C.T.A.C.T. Firm* v. *Maung Aye*, A 1937 Rang 197, 171 IC 527). All must be joined in one suit. Members of a joint Hindu family cannot be impleaded in a suit on a promissory note executed by the *karta*, even for family necessity. The plaintiff can join them only if he brings a suit on the original consideration (*Ram Gopal* v. *Dhirendra*, 31 CWN 357, 54 C 380, A 1927 Cal 376; *Thakur Pd* v. *Ayodhya Pd*, 180 IC 365; A 1939 Pat 490. *Ramanathan* v. *Muthuraman*, (1941) 2 MLJ 816; *Mahadeb Ram* v. *Jagannath Pd*, A 1942 Pat 337), but even then their liability is not personal (*Jiwandas* v. *People's Bank*, A 1937 Lah 926), and even the joint family property will not be liable unless it is proved that the debt was binding on the family, e.g., that it was taken for a legal necessity or for the benefit of the family (*Srikant Lal* v. *Sidheshwari Prasad*, 170 IC 357, A 1937 Pat 455). In this last case the question of authority of the manager to contract loans on pronote for the benefit of the family has been fully discussed. The Nagpur and Calcutta High Courts have, however, held that a suit can be brought against a joint family on a pronote executed by the *karta*, but the liability of other members will have to be established (*Sagarmal* v. *Bhikusa*, A 1936 Nag 252; *Gendulal* v. *Janglal*, A 1948 Nag 131; *Lilavati* v. *Guru Prasad*, A 1947 Cal 259, 274 IC 586).

Similarly, other partners can be made liable on a pronote executed by one partner for the partnership, provided *an independent contract* (apart from the mere execution of the pronote) is alleged, and in such cases evidence of such independent contract can be given (*Venkatachala* v. *Ramakrishnayya*, A 1930 Mad 168). Where a partner signed a pronote as "X managing partner of XY" it was held that X was acting on behalf of the firm and the firm can be made liable on the original consideration (*Chandan Mal* v. *Mt. Krishna Kumari*, A 1944 Oudh 273). If pronote is proved to be executed on behalf of the firm, the other partner can be made liable thereon (*Pandit Lal Mani* v. *Lala Gopal Sah*, A 1945 All 221; *Ghisulal* v. *Haji Mohd.*, A 1981 Raj 58). Suit cannot be brought by a person to whose share the pronote is allotted in a partition with the payee without an endorsement by the payee (*Virappa* v. *Mahadevappa*, 36 BLR 807, A 1934 Bom 356). Where a joint Hindu family was partitioned by means of a written arbitration award and promissory notes standing in the name of one member were allotted to the share of another, the latter could maintain a suit on the promissory notes so allotted (*Rat Ram Kishore* v.

No. 106—Suit on a Promissory Note

1. The defendant executed a promissory note on December 6, 1993, for Rs.1,000 payable to the plaintiff on demand, with interest at 1 per cent per mensem.

Ram Prasad, A 1952 All 245; also see, *Muthaveeraw Chetty* v. *Govinda Chetty*, (1961) 2 MLJ 470 FB).

A promissory note can be transferred as an actionable claim by means of an instrument in writing, e.g., a sale deed, and the transferee shall acquire the rights of the transferor. He shall be able to maintain an action on the promissory note, though he will not be a holder in due course (*Venkatarama* v. *Krishna Swarup*, A 1933 Mad 153 (1); *Subbarayndu* v. *Subbarayndu*, A 1935 Mad 473; *Surat Chandra* v. *Kripanath*, A 1934 Cal 549; *Ghanshyam Das* v. *Ragho Sahu*, A 1937 Pat 100; *Vaddadi* v. *Hanwara*, A 1956 AP 9).

Alternative claims: In suit between immediate parties, it is advisable, if there is any doubt as to the validity of the bill or the note or as to the right of recovering upon it as such, to base the claim, in the alternative, on the original consideration. For example, when the stamp on a promissory note is not properly cancelled, or there are some material alterations in the note which might make it void under section 87, or when sons of a Hindu executant are impleaded. But this alternative suit is permissible only when the promissory note was executed as sort of conditional payment of the loan, or when it was executed as security for the loan (*Bhushanchandra* v. *Kandi Lal*, 170 IC 758, A 1937 Cal 241; *Ramasamy* v. *Murugiah*, 161 IC 273, A 1936 Mad 179). Where, however, the contract is considered as contained wholly in the promissory note, section 91, Evidence Act will bar the proof of the loan independently of the promissory note (*Jacob and Co.* v. *A P. Vicumsey*, 102 IC 138, 29 BLR 432; *Perumal* v. *Kanakshi*, A 1938 Mad. 785, 177 IC 236, 1938 MWN 722; see contra *Chinayya* v. *Srinivasa*, 160 IC 1069, 43 LW 48), nor can the note be looked into to fix interest which can be awarded only under the Interest Act. (*Anupal Mehta* v. *Mahesh Jha*, 172 IC 744, A 1937 Pat 65, *Babulal* v. *Durga Prasad*, A 1940 Oudh 308, 188 IC 184).

The Oudh Chief Court has, however, allowed interest as compensation for deprivation of the use of money (*Ambika Singh* v. *Jagdeo*, 168 IC 927, A 1937 Oudh 387). Therefore, if an alternative claim on the loan is brought, care should be taken to draft the plaint so as to keep clear of section 91(b) Evidence Act, though the courts are indulgent in the matter of allowing plaintiff to fall back on the original consideration and generally allow him to do so as far as possible (*Sarab Dial* v. *Nanda Mal*, A 1936 Pesh 143). When a promissory note is not taken in discharge of an oral contract of loan but is taken by way of collateral security as it will be presumed to have been so taken, section 91 has no application (*Lakshmi Devi* v. *Mst. Aparna Devi*, 1951 ALJ 222). In a suit on the original consideration it is not necessary to mention in the plaint the fact of the execution of the pronote and of its being inadmissible for want of stamp (*Onkar Ballabh* v. *Girwar Lal*, 1936 AMLJ 37).

2. The said note or any part of it has not been paid (*or*, the defendant has paid Rs.200 on July 7, 1995, and has not paid any other sum towards the said note).

The Calcutta High Court has granted a decree on the original consideration even when the suit was on a pronote which was found to be inadmissible and held that it is not necessary to prove an independent promise to pay as the fact of loan implies a promise to repay it (*Mohatabuddin* v. *Mahomed*, 40 CWN 473; *Indra Chandra* v. *Hiralal*, 40 CWN 696, A 1936 Cal 127). The Allahabad High Court in *Lakshmi Narain* v. *Mst. Aparna Devi* A 1953 All 535, following its earlier decisions in *Nazir Khah* v. *Ram Mohan*, A 1931 All 183 FB; *Sheonath* v. *Sarjoo Lonia*, A 1943 All 220 FB; and *Major Mistri* v. *Binda Devi*, A 1946 All 126 FB, held that in case of a pronote and a simultaneous transaction of loan, if the pronote is inadmissible for some reason, suit will lie on the original loan, and the loan can be proved by oral evidence. Section 91 of the Evidence Act will not apply in such a case. The Oudh Chief Court has held that if the fact of taking loan is mentioned in the plaint even without clearly raising an alternative claim, an alternative claim on the original consideration should be held to be made out (*Chandamal* v. *Mt. Krishna Kumari*, A 1944 Oudh 273).

Where in a suit for the recovery of money on the basis of promissory note and not on original consideration or on transaction anterior to or independent of execution of promissory note, the promissory note is found inadmissible, no decree can be given in favour of the plaintiff on the basis of the original consideration (*T. Chandari* v. *Kambrath Kanarakutty*, A 1990 Ker 122; *Bharpura* v. *Diwan Chand*, A 1940 Lah 329, 190 IC 846)

An assignee to whom a pronote and not the debt has been assigned by endorsement cannot claim on the original consideration (*Ramanathan* v. *Muthuraman*, 1941 MLJ 816; *Maung Pho Mya* v. *A H. Dawood*, 11 LBR 137, 66 IC 584), and cannot therefore make others, e.g., sons etc., liable (*Viragavlum* v. *Chinna*, A 1939 Mad 856) nor is such an alternative claim possible where a pronote was executed in lieu of a previous pronote which is now barred by limitation (*Bhagwan* v. *Parag*, 9 OWN 961).(As to amendment of a claim on pronote so as to base it on original consideration see Chapter X).

A suit on the original consideration independently of the pronote or *Hundi* is permissible provided there are no circumstances which keep intact the liability of the maker under the note (*Krishna Jana* v. *Seeta Nath*, A 1937 Cal 753, 174 IC 340); and provided the plaintiff has not lost his right to enforce the Hundi (*Wallibhoy* v. *Jagjiwandas*, A 1936 Nag 260). But if the pronote is found to be forged, a claim on the original consideration cannot be permitted (*Ladhuram* v. *Bansidhar*, 171 IC 881, A 1937 Pat 572). It is not permissible for a beneficiary of a Hundi to sue on the original consideration without impleading the *benamidar* holder (*Keshab Kumar* v. *Singai Moti Lal Kastur Chand*, A 1949 Nag 21).

Renewal of a negotiable instrument: When cause of action for money on a bill is once complete and the debtor then gives another bill to the creditor, the

The plaintiff claims:

(1) Rs. ____as per account given below.

(2) Interest from date of the suit to that of payment.

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creditor, if the bill is not paid at maturity, must always sue on the original bill provided that he has not endorsed, or lost, or parted with the second bill under circumstances making the debtor liable under it to a third person. The effect of giving a new instrument is not to discharge the old one (*Punjab National Bank* v. *Tajammul*, 100 IC 341, 25 ALJ 102; *Sheikh Akbar* v. *Sheikh Khan*, 7 C 256; see also, *Kshetra* v. *Harasukdas*, 102 IC 871, 45 CLJ 233, A 1927 Cal 538 DB).

Limitation: Three years from different dates in different cases (vide Articles 21 and 41).

Defence: Besides any defect in the bill or note, want of due presentment or of notice of dishonour may be pleaded. It may be pleaded that the suit has been brought before maturity but the maker of a promissory note cannot deny its validity as originally made, and cannot, in a suit by a holder in due course, plead the incapacity of the payee to endorse the instrument. The acceptor cannot deny the payee's capacity or the authority of the drawer to draw or endorse the bill, though he may plead that it was not drawn by the person by whom it purports to have been drawn. An endorsee cannot in a suit, by a holder, deny the signature or the capacity of any prior party. The defence of want of consideration is admissible only as between parties who stand in immediate relationship with each other. In a suit by holder for consideration or his assignee the maker or the drawer cannot deny consideration of the note or bill (section 43). But the fact that the consideration was of a different nature from that mentioned in the instrument is no defence (*Barhamdeo* v. *Karising*, 165 IC 809, A 1936 Pat 498; *Lakshmanaswami* v. *Narasimha*, 1936 MWN 437). The Allahabad High Court has held that the protection of section 43 is not open to an assignee under assignment made by a separate sale-deed and not by endorsement (*Jangbahadur* v. *Chanderbali*, 181 IC 897, A 1939 All 279; see contra, 1962 Ker LJ 251). The defence of payment to endorser is not open to a maker in a suit by an endorsee who had no knowledge of the alleged payment (*Anamalai* v. *Maung Saing*, 103 IC 139, 5 Bur LJ 241; *Gopalan* v. *Lakshminarasamma*, 191 IC 40, A 1940 Mad 631), nor can the maker of a pronote, when sued by an assignee of the note plead payment to the promisee, his remedy being against the promisee (*Alapati* v. *Vemuri*, A 1948 Mad 171, 1947 MWN 502, (1947) 2 MLJ 196). He is liable for negligence in not requiring the pronote for cancellation (*Sriniwas* v. *Karan Goverder*, A 1966 Mad 176). The defendant in a suit on a promissory note may show that it was given merely as a security for the plaintiff's share of the capital advanced towards a partnership and that the note can be enforced only when such capital becomes payable (*Sheo Prasad* v. *Govind Prasad*, 100 IC 352, 49 A 464). He cannot plead that there are accounts to be settled and that the amount would be given credit for in the final settlement of accounts between the parties (*Ghanshiam Das* v. *Mithan Lal*, 124 IC 763). He cannot plead that the plaintiff (payee) was a *benamidar*

No. 107—Suit on a Promissory Note and, in the alternative, on Original Consideration

1. On January 12,1994, the defendant borrowed Rs.500 from the plaintiff agreeing to repay it on demand with interest at 1 per cent per mensem. (*Or*, on January 12,1995, the defendant made an account of the previous mutual dealings between the parties and found a balance of Rs.500 due from him. The said accounts were stated by the defendant in writing and the balance was struck and signed by the said defendant in the plaintiff's *khata bahi* at page 8).

2. As a security for the aforesaid loan (*or*, balance on account stated), the defendant executed a promissory note on the aforesaid date, payable to the plaintiff on demand, with interest at 1 per cent per mensem.

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for another (*Raghubir* v. *Ramashray*, 183 IC 60, A 1939 Pat 347; *Ghanshyam* v. *Raghu*, A 1937 Pat 100; *Reoti* v. *Manna*, 44 All 290; *Subha* v. *Ramaswami*, 30 Mad 88; *Bapu Kalingarayar* v. *Rajam alias Rajalakshmi*, 1978 1 MLJ 67).

It has been held in Rangoon and Madras that a defendant cannot prove that the promissory note was given in repayment of an advance made by the plaintiff to a partnership capital and that the money due could not be claimed without going into the general accounts of partnership (*Maung Kyan* v. *Aruna Challam*, 5 R 520; *Vallamkonnuy Mahupeddi*, 31 M 342; *Kaluram* v. *Bhojraj*, 1938 MLJ 1). The defendant (maker) cannot plead that the pronote was not executed really in plaintiff's favour and that he has made payments to the person in whose favour he really meant to execute it (*Subba Narain* v. *Ramaswami*, 33 M 88, 15 MLJ 508; *Madari Lal* v. *Lal Chand*, 100 IC 703 All). Where defendant executed a pronote for Rs. 500 and it was understood between the parties that if a prior payment of Rs. 500 said to have been made by defendant could be traced in plaintiff's books, the defendant would be exonerated of his liability under the pronote, the defendant was allowed to plead in suit on the pronote that Rs. 500 had been subsequently traced. (*Chunni Lal* v. *Hira Lal*, 26 ALJ 183). In a suit by an alleged owner for consideration, the defendant can plead that he is not bound to pay until the plaintiff obtains a discharge from the holder of the pronote (*Sree Kristo* v. *Seetanath*, 41 CWN 1283, A 1937 Cal 753, 174 IC 340, 66 CLJ 54 DB).

The defendant may plead that some material alterations have been made in the negotiable instrument and therefore no suit can be brought upon it (section 87) (*Sundar* v. *Mahadeo*, 23 ALJ 253). The alteration must be in the body of the instrument and a forged endorsement of payment is not a material alteration (*Chandukti* v. *Kunbi*, 163 IC 803, A 1936 Mad 616; *Saripalli Subbarao* v. *Gumnan Ramarao*, (1979) 1 APLJ 169). In order that the alteration may be material, it must make a change as regards the rights and liabilities of the parties or their legal position (*Nathu Lal* v. *Mt. Gomti Kuar*, A 1940 PC 160; *Surendra* v. *Krishna*, 182 IC

3. Rs.580 is now due to the plaintiff.

Particulars

	Rs.
Principal	500
Interest from January 12, 1994 to September 12, 1995	80
Total ...	580

The plaintiff claims:

(1) Rs.580, on the basis of the pronote.

(2) Alternatively, the like sum, as money lent (*or*, on account stated).

(3) Interest from date of suit to that of payment at 1 per cent per mensem.

PARTNERSHIP *(kk)*

No. 108—Suit for Dissolution and Account

1. On June 20, 1990, the plaintiff and the defendant entered into partnership in the business of commission agents and verbally agreed that the business should be run at Shamli under the name and style of Sada

615, A 1939 Cal 181; *Janardan* v. *Prandhan*, 5 CLT 45). If a stamp on promissory note is cancelled by drawing two parallel lines on it, there is no material alteration (*K.A. Lona* v. *Dada Haji Ibrahim Hilari & Co.*, A 1981 Ker 86). It must be by a party to the instrument or his representative and not by a stranger (*Krishna Charan* v. *Gaurochandro*, A 1940 Mad 61). It is not necessary that the alteration should be prejudicial to the person pleading it, e.g., when 3 persons are sued and one pleads that his signature is a forgery, the other can also take advantage of the plea and the suit should be dismissed even against latter (*Rangayya* v. *Sundara Murty*, A 1943 Mad 511). If he is a minor he may plead that the instrument drawn by him is invalid. This plea will not be barred by section 120, as section 120 is subject to section 26 (*Chengalaroya* v. *Nainappa*, 117 IC 133 Mad).

(kk) A partnership contract is governed by the agreement on which it is entered into, and in the absence of any such agreement, by the provisions of the Partnership Act (on what constitutes partnership see *Raghunath* v. *Trinath*, A 1985 Ori 8). The Act requires that all firms should be registered, and if a firm is not registered it cannot sue a third person nor can a partner sue the firm on the basis of any contract (section 69). Subsequent registration of the firm does not cure the defect (*Annapoorna F.&.G. Stores* v. *Arunodaya F.& G. Stores*, A 1994 AP 197

Sukh Ram Lal, that the plaintiff should do the selling and purchasing work and the defendant should do the account and correspondence work and should be incharge of the funds belonging to the partnership and that both should contribute equally to the capital of the partnership and should share equally the profits and losses thereof.

(DB)). But a suit for dissolution and accounts can be brought by a partner [section 69 (3) (a); *Shibba Mal* v. *Gulab Rai*, 1939 ALJ 964, A 1939 All 735; *D.C. Upreti* v. *B.D. Karnatak*, A 1986 All 32]. A plaint in the name of an unregistered firm is legally *non est* for all purposes, but a plaint or a proceeding instituted in the trade or business name of a sole owner is not similarly deemed to be void when erroneous description was made without any fraudulent and malafide motive.

After dissolution of the firm, however, any partner to whose share a debt has been allotted can sue to realise it (*Sanka* v. *Batter*, A 1948 Mad 441, (1948) 1 MLJ 394, 1948 MWN 343). But though a decree "for accounts" by which a receiver could be appointed to take accounts can be granted, a decree "calling upon the defendant to render accounts" is not permissible (*Magan* v. *Ram Pratap*, 184 IC 160, A 1939 All 535). A firm shall be deemed to be registered on the date when the Registrar of Firms enters the statement in the register of firms and so a suit brought before such date though after the date of application for registration is moved, is not maintainable (*Popular Fils* v. *Nalini Saigal*, 84 CWN 707). Registration after institution of the suit cannot save the suit (*Firm Dnamal Purshotam* v. *Firm Babulal Chotelal*, A 1936 All 3; *Prithvi Singh* v. *Hassan Ali*, A 1951 Bom 6; *Govind Lal* v. *Kunj Behari*, A 1954 Bom 364; *Union of India* v. *Durga Dutt*, A 1961 Ass 2; *Kapur Chand* v. *Laxman*, A 1952 Nag 57). A suit dismissed on account of non-registration of the firm cannot be validated in appeal if the firm has been registered in the interval (*Jakiuddin* v. *Vithoba*, A 1939 Nag 301, 186 IC 670). Where the firm could not sue, a transferee from that firm also could not (*Kaniram* v. *Parmananda*, 191 IC 39, A 1940 Cal 528). But if an unregistered firm is sued and decree is passed it can appeal against that decree (*A.V. Sundaram* v. *T.O. Ithamthu*, A 1945 Mad 209).

A partnership may be dissolved by the parties themselves, or by the court. A partnership at will may be dissolved by any partner by notice to the others (section 43); but if the assistance of the court is required for dissolution a suit can be brought after the notice (*Tajammul Husain* v. *Ahmad Ali*, 13 Lucknow 219, A 1937 Oudh 438, 167 IC 83). A suit for dissolution of partnership can be brought on any of the grounds mentioned in section 44. Even a partnership entered into for a fixed term can be dissolved if the partners have lost confidence in each other (*Tulsi Ram* v. *Dina Nath*, A 1926 Lah 145, 89 IC 333). But neglect of one partner alone to further the partnership business is no ground for dissolution (*Chunni Lal* v. *Sheocharan*, A 1925 All 787 DB). **The grounds should be specifically stated in the plaint, as also the terms of the partnership, if profits are claimed.** Accounts may be demanded, and if necessary, a prayer for appointment of a receiver may be made. If the partnership has been dissolved by the parties themselves, a suit for

2. The said partnership business has been carried on, on the said terms since the said date, but for some time past it has become impossible to carry on the business of the partnership except at loss. (*Or*, the defendant has been guilty of gross misconduct in the affairs of the partnership.

account only may be brought and the mere fact that account books are in possession of the plaintiff himself does not debar him from bringing a suit (*Dogar Singh* v. *Mst. Parbati*, 161 IC 669, A 1936 Lah 146). A plaintiff may pray for winding up the partnership on an allegation of dissolution, or for dissolution by court, in the alternative. **The shares of the partners must be alleged in all suits in which an account is claimed. It is not necessary to allege any other terms of the partnership except those on which the suit is based.** e.g., if dissolution is claimed on the breach of any term by the defendant, the term must be alleged. A suit for account by one partner against another without a prayer for dissolution does not lie unless it seeks the discharge of an obligation undertaken by the defendant under the partnership contract, e.g., to render accounts annually (*Binjraj* v. *Kison Lal*, A 1933 Nag 127, 141 IC 277). When it is necessary to go into the accounts before giving the plaintiff an effective relief, the court may pass a preliminary decree before passing a final decree (O.20, R. 15). If after preliminary decree no action is taken by the court, the plaintiff may at any time apply for further action and for passing a final decree. Such an application is not governed by any rule of limitation (*Ramanatha* v. *Alagappa*, 53 M 378). As the forms of preliminary and final decrees given in the C.P.C. (forms No.21,22, Appendix D) would show, a court is bound to give all necessary instructions for the winding of the partnership, and to adjust all accounts between the parties, and to make any of them liable to pay to another any sum found due. It is not, therefore, necessary to claim any specific sum from any of the defendants. If there are no outstanding debts to be realised or no partnership property to be turned into money, the appointment of a receiver need not be asked for. **If dissolution prior to suit is alleged, its date and as to how it came about must be alleged.** If accounts have also been settled, then the plaintiff may sue for the amount for which the defendant has made himself liable to the plaintiff under the settled account. **In that case the settlement of account must be specifically alleged with particulars.** The recital in the deed of dissolution of partnership that the property at the time of dissolution was a partnership property is admissible in evidence (*Gangadhar Madhavarao Bidwai* v. *Hanmantarao Vyankatrao Murgali*, (1995) 3 SCC 205).

All the partners should be made parties to a suit for dissolution (*V.P.R. Prabhu* v. *Surendranath*, A 1985 Ker 265), and, if a partner is dead, all his heirs must be impleaded. A suit for account by some of the heirs of a partner without impleading the other heirs is bad and the defect cannot be cured after limitation (*Syyad Abdul Hawk* v. *Tumuluri*, 100 IC 616, 52 MLJ 318, A 1927 Mad 491). In an Allahabad case, however, it was held, that other partners could be added as *proforma* defendants even after limitation (*Jamna Kuer* v. *Kunj Behari*, A 1937 All 502, 170 IC 743, 1937 AWR 527). If the manager alone of a joint family is a partner, it is not necessary to implead the junior

Particulars: The defendant, having the control of the partnership funds, has given loan of Rs.2,000 out of them to his nephew Sada Ram, on March 20, 1994 at an interest of 6 per cent per annum, and in order to carry on the business of partnership, has borrowed, on March 20, 1994, Rs.1,500 from the Allahabad Bank at 9 per cent per annum).

The plaintiff claims:

(1) Dissolution of the partnership;

(2) that accounts be taken; and

(3) that a receiver be appointed.

No. 109—Suit for Dissolution of Partnership
(Form No. 49, Appendix A, C.P.C.)

AB, the above named plaintiff states as follows:

1. He and CD, the defendant, have been for _____ years (*or*, months) past carrying on business together under articles of partnership in writing, (*or*, under a deed, *or* under a verbal agreement).

2. Several disputes and differences have arisen between the plaintiff and defendant as such partners, whereby it has become impossible to carry on the business in partnership with advantage to the partners.

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members (*Manohar* v. *Ram Richpal*, 125 IC 628 Lah), nor can a junior member sue for dissolution but if on dissolution the manager makes an arrangement which is prejudicial to the interest of the family he can sue to recover the manager's share in the assets (*Venkataraman* v. *Vardhalu*, 50 LW 681, 1939 MWN 1028). A Hindu joint family cannot as such enter into partnership, though its manager and other members may. If the manager enters into partnership in a representative capacity that capacity will govern his relations with other members of the family but *qua* the other partners he acts in his personal capacity (*V.P.R. Prabhu*, supra, following *I.T.C.* v. *Bagyalakshmi & Co.*, A 1965 SC 1708). A suit for account or balance due cannot be brought when all partners of the plaintiff firm are also members of the defendant firm; in such a case the proper remedy is a suit for partnership account of the defendant firm (*Pokhar Das* v. *Sewa Ram*, 125 IC 801, A 1929 Sindh 192). Individual partners cannot sue for their shares of any separate part of the partnership assets until the accounts are completely settled (*Sonunram Mukhi* v. *Sewaram*, 178 IC 53, A 1938 Lah 259).

The question as to who used to keep the accounts or the funds of the partnership, and in whose custody the account-books are, should be considered after the passing of a preliminary decree. The procedure which should be followed for the settlement of accounts is described in *Thirukumaresan* v. *Subbaraya*, 20 M

(*Or*, the defendant has committed the following breaches of the partnership articles:

(1)

(2)

(3)

No. 110—Suit for Winding up a Partnership

Para 1 as in precedent No. 108.

2. The said partnership was, by mutual verbal agreement, dissolved on November 5, 1994.

The plaintiff claims:

(1) That an account of the partnership be taken.

(2) That a receiver be appointed.

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313. Accounts should be taken from the beginning unless it is shown that there was settlement at a later stage (*Shawal* v. *Tansukhdas*, 125 IC 721, 33 CWN 1101, A 1930 Cal 154). Ordinarily the suit should be for general accounts, and in the absence of special circumstances, a claim for partial accounts will not be entertained (*Lachmichand* v. *Jagoolal*, 166 IC 953, A 1937 Pat 55).

Before a dissolution takes place, or unless a dissolution is also claimed, no partner has a right to call for accounts from another partner (*Seth Kassamal* v. *Gopi*, 9 A 120), nor can a partner discharging a partnership debts sue for contribution (*Shidlingappa* v. *Shankarappa*, 28 B 176). But in respect of any matter which can be determined without going into partnership accounts, a suit may be brought in the ordinary way, e.g., for defendant's share of capital or for an injunction to restrain waste of partnership property.

A plaintiff suing for dissolution of a partnership which, under the terms of the agreement of the partners, is for fixed term, which has not yet expired, must make out a very strong case for dissolution before any relief could be granted in violation of the terms of the agreement (*Mani Lal Bechar Lal* v. *Khesabji*, 6 DLR Pat 140). The consent of the partners for dissolution of a firm may be express or implied. Where the partners close a firm and starts new firm, give up their share in the old firm, there is dissolution of old firm (*Pandurang N. Vanarase* v. *Janardhan Narayan, Varanase*, 1995 AIHC 1863 Bom). A suit for money due to partnership by one of the partners alone, in his name, is not maintainable (*Chhotey Lal Ratan* v. *Rajmal*, A 1951 Nag 448).

An agreement of partnership need not be express and can arise out of mutual understanding evidenced by a consistent course of conduct and by express admission of the partners (*Chotey Lal Ratan* v. *Rajmal*, A 1951 Nag 448).

No. 111—Suit for Winding up on the Allegation of Dissolution or, in the Alternative, for Dissolution

Paras 1 and 2, as in the last precedent.

3. It has become impossible to carry on the partnership business except at a loss.

The plaintiff claims:

(1) A declaration that the partnership was dissolved on November 5,1994; or,

(2) In the alternative, that the partnership be dissolved by decree of the court.

(3) and (4) as (1) and (2) in the previous precedent.

PLEDGE *(ll)*

No. 112—Suit by a Pawnee for Money and Sale of Pledged Property

1. On January 20,1994 the defendant borrowed Rs.1,500 from the

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Court-fee is calculated on the amount at which the plaintiff values his suit

Limitation. A suit for dissolution was under the Act of 1908 governed by Article 120 and not by Article 106 which applied to a suit for account *after* dissolution (*Khorasany* v. *C.Acha*, 6 R 198, 110 IC 349, A 1928 Rang 160 DB; *Srinivasalu* v. *Rama Krishna*, 1933 MWN 689, A 1933 Mad 353, 142 IC 573). Under the Act of 1963, Article 113 and not Article 5 will apply.

A suit by an expelled partner for accounts or for dissolution and a share in profits was governed by Article 120 and not Article 106 (*Din Mohomed* v. *Kashi Ram*, 120 IC 613 Lah), so also a suit for account based on an agreement to render accounts and distribute property annually (*Binjraj* v. *Kishanlal*, A 1933 Nag 127, 141 IC 277).

Defence. To a suit for dissolution of a partnership at will, the defendant can hardly have any defence; but if dissolution is claimed on any other ground, e.g., misconduct of the defendant or breach of any term of partnership, the same may be denied. He may plead that the partnership, has already been dissolved by mutual agreement. The shares alleged by the plaintiff may be disputed. If a suit is brought for winding up the partnership, the defendant may plead that it has not yet been dissolved, or he may admit the dissolution and plead that accounts were also settled and squared up at the time of such dissolution. It is premature to set up, before the passing of a preliminary decree, any objection about the accounts, e.g., that the plaintiff has realised all the assets.

(ll) The three essential features of a pledge are (i) there must be bailment, *i.e.*

plaintiff, and in consideration of the said loan executed a pronote payable on demand and carrying interest at 9 per cent per annum. As a collateral security for the said loan, the defendant pledged the goods detailed at the foot of the plaint with the plaintiff.

2. The defendant has not repaid the said loan or any part thereof.

The plaintiff prays (1) that a decree for Rs.1,500 principal and Rs. 450 interest, with further interest after the date of suit be passed; and,

(2) that the said goods be ordered to be sold and the proceeds be applied to the satisfaction of the decree.

[*Or*. The plaintiff prays (1) that the said goods be ordered to be sold and the plaintiff's claim for Rs.1,500 principal and Rs. 450 interest with further interest after the date of suit be satisfied out of the sale proceeds].

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delivery of goods; (ii) the bailment or delivery must be by way of security; (iii) the security must be for payment of a debt or performance of a promise (*Shaizadi Begum* v. *Girdhari Lal*, A 1976 AP 273). Under section 176, Contract Act a pawnee can either himself sell the goods pledged and sue for any balance remaining due to him, or he can sue upon the debt, retaining the goods as collateral security. But this does not, it is submitted, mean that he can bring a suit for money withiout making any mention of the pledge, for, if he were allowed to do so, he could execute the decree against the person or other property of the debtor, retaining the pledged goods and this would be very hard on the debtor. It has even been held that a pawnee cannot maintain the suit for his debt unless he is in a position to produce the goods pawned on payment or to account for the same (*Trustees* v. *Dixon Johnson*, 1926 AC 489; *Rahmat Ali* v. *Lallan Prasad*, 1962 ALJ 324 DB; also see, *Lallan Pd.* v. *Rahmat Ali*, A 1967 SC 1322; *Prestolite of India Ltd.* v. *Union Bank of India*, A 1986 P & H 64). The court will generally give a direction for satisfaction of the decree by sale of the goods pledged and for execution against other property only for the balance. The general practice is to bring suit for sale in the form adopted in the precedent No.112. The same forms appear to have been adopted in the cases (*Madan Mohan* v. *Kanai*, 17 A 284, and *Mahalinga* v. *Ganpathi*, 27 M 528 (though the relief may as well be worded as within brackets).

If the pawnee wants to exercise the option of private sale, he must give reasonable notice of his intention to the debtor though it is not necessary that date and time of sale should be communicated by the notice (*Kunj Behari* v. *Bhargava Commercial Bank*, 45 IC 462, 40 A 522, 16 ALJ 390). Such notice cannot be dispensed with even by contract (*Co-operative Hindustan Bank* v. *Surendra*, A 1932 Cal 524, 138 IC 852, 59 C 667). If no notice is given pledger can bring a suit for redemption against vendee even if he is an innocent purchaser without notice of pledge (*Official Assignee* v. *Madholal*, A 1947 Bom 217). No notice of adjourned date of sale is necessary (*ibid*). A pledger cannot compel the pawnee to exercise the power of sale

(3) that should the sale proceeds prove insufficient to satisfy the plaintiff's said claim, the plaintiff be given a personal decree against the defendant for the balance.

No. 113—Another Suit after Private Sale of the Property

1. *Same as in the previous precedent.*

2. On March 4, 1996, the plaintiff sent notice to the defendant by registered post demanding the money due to him within 15 days and intimating that, in case of default of payment, the plaintiff would sell the pledged property.

3. The defendant did not pay the amount due to the plaintiff or any part thereof.

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as a means of satisfying the decree which the latter has obtained (*Ramaswamy* v. *Palaniappa*, 30 LW 898). The pawnee is not put to exercise his judgment at his peril as to when is the proper and reasonable time for him to sell, as considerations applicable to an unpaid seller and buyer are not applicable in his case (*Mannargudi* v. *Ramaswami*, 1929 MWN 167). **In such a case, he should allege a demand for the amount due, unless the same was payable at a fixed time, a default by the pledger, a notice of sale, an actual sale and the fact that the sale proceeds were insufficient to satisfy the claim** (*Alliance Bank* v. *Ghammandi Lal*, 101 IC 725, 8 Lah 373). Where no time is fixed for payment reasonable notice of demand should be given and right of sale will accrue when the demand is not complied with (*Motilal* v. *Lakshmi Chand*, A 1943 Nag 162; *Ram Dalay* v. *Sayyad*, A 1944 Pat 135). The right of pledgee to realise money out of the sale proceeds of the pledged goods gets priority over other creditors who can only realise their dues after the debt of the pledgee is satisfied (*Central Bank of India* v. *State of Bihar*, ILR (1979) 58 Pat 68).

Limitation : for a suit to recover the debt is three years provided by Article 19. The collateral security of pledge does not make any difference. But limitation for a sale was six years as provided by Article 120 of the Act of 1908 but will now be 3 years under Act 113 of the Act of 1963. If a creditor exercises his right of private sale, his suit for recovery of balance is to be brought within the original three years provided by Article 19 and no new cause of action arise from the sale. The position was same under Article 57 of the old Act (*Yellappa* v. *Desayappa*, 30 B 218, 7 BLR 739; *Saiyid Ali* v. *Debi Pd*., 24 A 251). Even if the agreement is that pawner should sell the goods pledged, and the pawnee should realise his debt out of the sale proceeds, the pawnee's suit for recovery of the debt or any balance should, it was held, be brought within three years provided by Article 57 (now Article 19) and the right to recover the debt cannot be held to be suspended till the goods are sold (*Debi Din* v. *Gaya Pd*, 109 IC 64). The right of creditor against the pledged goods continues even after suit becomes time-barred (*T.S. Kotagi* v.

4. The plaintiff sold pledged property through Ram Lal, on March 20, 1996, and realised Rs.1,050 from the sale, Rs.752 is still due as per account given below.

The plaintiff claims Rs.752 with interest from date of suit to that of payment.

RAILWAYS AND CARRIERS *(mm)*

No. 114—Suit against a Carrier, not being a Common Carrier, for Injury to Goods

1. By a verbal agreement entered into between the plaintiff and the defendant on March 15, 1995, the defendant undertook to carry carefully by a motor lorry the plaintiff's goods detailed at the foot of the plaint from Saharanpur to Dehradun and there deliver the said goods to the order of the plaintiff.

2. On March 16, 1995, the defendant received the said goods for the purpose and on the terms aforesaid, but did not carefully carry the goods.

3. The said goods were broken and damaged, whilst being carried upon the said journey, by the negligence and want of care of the defendant.

Particulars of Negligence and Want of Care

* * *

Particulars of Damage

* * *

The plaintiff claims Rs.4,000, with interest from date of suit to that of payment.

Tahsildar, A 1985 Karn 265; referred to *Balkrishna* v. *Swadesi Polytex*, A 1985 SC 520).

(mm) **Carrier** is a person who undertakes to transport the goods of another person from one place to another. The term "**common carrier**" denotes a person, other than the government, engaged in business of transporting for hire, property from place to place, by land or inland navigation, for all persons indiscriminately (section 2 Carriers Act III of 1865). But a motor bus service intended for transport of passengers and their luggage only, cannot be deemed to be a common carrier for parcels (*Maddappa* v. *Firm of Ramiah*, 17 Mys LJ 284). A Motor Transport Co. and Steam Navigation Co. are examples of common carriers but a carrier by sea is not a common carrier. Whereas a porter or cart-man is governed by contract, the liabilities

No. 115—Suit against Common Carrier for Damages for Delay in Delivery of Goods

1. The defendants are common carrier of goods by steamer from Ghazipur to Bhagalpur.

2. On June 4, 1995, the plaintiff delivered to the defendants one parcel of butter to be conveyed by them as such common carriers from Ghazipur to Bhagalpur and there delivered to the plaintiff within a reasonable time.

3. The defendant failed to deliver the said parcel within a reasonable time, but delivered the same two days after the time when it ought to have been delivered, and when butter had become stale and worthless.

Particulars of Damage

20 Kgs. of butter at Rs.100 per kg. - Rs.2,000.

The plaintiff claims Rs.2,000, with interest from date of suit to that of payment.

No. 116—Suit against a Common Carrier for Loss of and Injury to Goods

1. The defendants are common carriers of goods from Chandigarh to Srinagar.

2. On May 4, 1995, the plaintiff delivered to the defendant four cases containing crockery to be conveyed by them as such common carriers from Chandigarh to Srinagar and delivered to the plaintiff.

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of a common carrier are governed by English common law as modified by the provisions of Act III of 1865 (see, *Uma Rani* v. *S.K. Datta*, A 1984 Cal 230). The Railways Act (IX of 1890) now The Railways Act, 1989 generally governs the liabilities of all railways, whether owned by the State or by private companies. See also, Carriage of Goods by Sea Act, 1925 and Carriage by Air Act, 1972 for cases not covered by the Carriers Act and the Railways Act. On carriage by air see *Rajasthan Handicrafts Emporium* v. *Pan Am*, 1984 Del 396.

In a suit against an ordinary carrier, the contract, with all its terms, has to be alleged in the plaint which is framed like a plaint in a suit against a person for breach of any other contract. In a suit for damage resulting from the carrier's negligence, the onus of proving negligence, will be upon the plaintiff, if the carrier has taken care of the goods as required by section 151, Contract Act. **In a suit against a common carrier, facts showing that the defendant is liable under the Carriers Act should be alleged in the plaint,** and the suit should be brought

3. The defendants delivered only three cases of crockery to the plaintiff at Srinagar, and one of the said three cases was delivered in a broken and totally worthless condition.

Particulars of Damages

Value of one case of crockery not delivered by the defendant, as per details given below— Rs.18,000.

Value of the crockery broken as per details given below Rs.6,000.

The plaintiff claims Rs.24,000 and interest from date of suit to that of payment.

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subject to that Act as to notice, etc. In a suit for loss, damage or non-delivery of goods entrusted to a common carrier, it is not for the plaintiff to prove negligence of defendant (section 9, Carriers Act), therefore the same need not be alleged in the plaint. It will be for the defendant to show diligence and explain the loss, etc. A common carrier can limit his common law liability by special contract (section 6) but liability for negligence being a criminal act cannot be curtailed (section 8) (*Murlidhar Mohanlal* v. *River Steam Navigation Co.*, A 1967 Assam 74). The liability of the common carrier is that of an insurer. The burden is on the carrier to prove that the loss, damage or non-delivery is not due to the negligence or criminal act of the carrier or his servants or agents (*Milap Carriers* v. *National Insurance Co. Ltd. Hyderabad*, A 1994 AP 24).

Where the carrier delivers the goods to the holder of the original way bill, he is not liable even if that holder acquired possession of bill unauthorisedly (*Amin & Co.* v. *S. Roadways*, A 1985 Mad 287, distinguished, *Easwara Iyer & Sons* v. *M. B Transport Co.*, A 1964 Mad 516, a case in which the person taking the delivery had not produced the original way bill). Where goods are consigned to a place beyond the scope of a carrier's business so that from that point he must forward them by another carrier, the carrier is responsible for the goods for the *whole* journey, unless he limits his liability by a specific agreement (*India General Navigation Co.* v. *Girdharilal*, 100 IC 903, 31 CWN 359, A 1927 Cal 394 DB).

No claim in respect of certain specified classes of goods can be made, if the value of the goods is worth over Rs.100 unless the value and description thereof has been declared before hand (section 3). A notice under section 10, Carrier's Act has to be given (*National Insurance Co.* v. *Om Prakash Poddar*, A 1993 Cal 26), but it may be served on any local representative of carrier, there being no special rule on whom it should be served (*India General Navigation* v. *Girdharilal*, A 1927 Cal 394, 100 IC 903, 31 CWN 359 DB), but it is not necessary to plead the giving of this notice in the plaint (*U. Ba Tin* v. *U. Tun On*, A 1938 Rang 437).

If consignment note has been endorsed by the consignor in favour of a bank for value received, then the bank can also file a suit jointly against consignor, guarantor and carrier (*Deccan Queen Motor Service* v. *I.D. Bank*, A 1985 Ker 1297; *Lal Chand Madhav Das* v. *Union of India*, A 1986 Del 29).

No.117—Claim against Railway for Shortage in Delivery

(Form I, Appendix XXVII, of Railway Claims Tribunal (Procedure) Rules 1989)

1. Particulars of the applicant—

Name and Address : Km. Manju Rani Agarwal,
D/o. Rajendra Kumar Agarwal
Sole Proprietor of the firm

The responsibility of all Railways (whether owned by the State or by a company), as carriers, for loss, destruction or deterioration of goods or animals is governed, not by the Carriers Act, but by sections 93 to 106 of chapter XI of the Railways Act, 1989 which should be carefully studied before drafting a plaint against a railway administration. **Facts showing the liability under the provisions of that chapter should be alleged in the plaint. If goods are consigned under any special agreement, facts should be alleged showing the liability of the Railways under the terms of that agreement.**

Now claims against the railway administration are to be filed before the Railway Claims Tribunal, and the jurisdiction of the Civil Courts is barred by section 15 of Railway Claims Tribunal Act, 1987. Claim Tribunals have been established for inquiring into and determining claims against railway administration for loss, destruction, damage, deterioration or non-delivery of animals or goods entrusted to it to be carried or for refund of fares or freight or for compensation for death or injury to passengers occuring as a result of railway accident (section 13).

Section 18(1) provides that the Claims Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure but shall be guided by the principles of natural justice, and subject to the other provisions of the Act, and of any rules, the Claims Tribunal shall have powers to regulate its own procedure.

An application to the Tribunal shall be presented in Form I or Form II or Form III [Appendix XXVII of Railway Claims Tribunal (Procedure) Rule 1989] to the Registrar of the Bench concerned.

An application for compensation in respect of loss, destruction, damage, deterioration or non-delivery of animals or goods or in respect of refund of fare or freight shall be accompanied by the following documents, namely-

(a) copy of the railway receipt/parcel way bill/luggage ticket;

(b) original sale invoice (*bijak*), if any;

(c) copy of order or letter, if any, of the railway administration deciding the claim of the party;

(d) copy of the original certificate issued by the railway administration regarding loss, deterioration or damage to the goods, at the time of granting open delivery or assessment delivery;

Luxman Prasad Karuna Nidhi,
Koocha Nazir Chhakka Lal,
Barabanki.

2. Particulars of the Respondent/ Respondents : 1. Union of India;
2. General Manager Northern Railway, New Delhi;
3. General Manager, Southern Railway, Madras.

3. Value of claim and details of application fee-
   (1) Value of claim : Rs.2250
   (2) Details of application fee : Rs.152

4. (i) Name and address of the Bank on which the draft is drawn: Punjab National Bank R.C.C., Lucknow
   (ii) Demand Draft No. and the Branch at which payable QFF 011846 Punjab National Bank R.C.C., Lucknow

Or

   (i) Number of Indian Postal order(s) No.OT/A/98 9073 46
   (ii) Name of issuing Hazaratganj, Branch, Lucknow

(e) copy of the notice under section 106 of the Indian Railways Act, 1989.

(f) copies of any other relevant document in possession of the applicant (Rule 7).

An application for compensation in accident claims may be filed before the Bench having territorial jurisdiction over the place where the accident occurred (Rule 8), and application for compensation for loss, damage, destruction, deterioration or non-delivery of goods or animals, may be filed before the Bench having territorial jurisdiction over the place where—

Post Office

(iii) Date of issue of postal order(s) 23.4.96 Rs.152/-

(iv) Post Office at which payable :

5. Full Booking particulars of the consignment —

Date of Booking	Railway Receipt or parcel-way-bill No.	Station From	Station To	Description of consignment
1	2	3		4
22.10.1995	927444	Barabanki	Mysore	One bale containing hand printed Art Silk Sarees

Value of Consignment	Any other particulars
5	6
Rs.2250.00	25 Sarees of the value of Rs.2250.00 were delivered short.

6. Date on which notice served on the Railway Administration under section 106 of Indian Railways Act, 1989 (*Attach proof*) : 8.2.1996

7. (i) Facts of the case :-

(*Give here a concise statement of facts in a chronological order,*

(a) the goods or animals were delivered for carriage; or

(b) where the destination station lies; or

(c) the loss, destruction, damage or deterioration of goods or animals occurred (Rule 9).

An application in respect of a claim for refund of fare or freight may be filed before the Bench having territorial jurisdiction over the place at which such fare or freight was paid or the place where the destination station lies (Rule 10).

each paragraph containing as nearly as possible, a separate issue, fact or otherwise)

(a) One bale containing hand printed Art Silk Sarees was despatched by the applicant from Barabanki under parcel-way-bill No.927444 dated 22.10.1995 for being carried to and delivered at Mysore.

(b) When the applicant, owner of the goods consigned approached the Railway authorities at the destination to take delivery of the aforesaid consignment, it was found in tampered and loose condition and restitched and short in weight. Consequently, open delivery was demanded and the same was given. Only 55 sarees were delivered to the applicant as against 80 sarees consigned i.e. 25 sarees were found short. Price of 25 sarees found short was Rs. 2,250 only.

(ii) *(a) Nature of the relief sought :*

Decree for recovery of Rs.2,250 together with costs of the case and *pendent lite* and future interest at the rate of Rs. 2% per month be passed in favour of the applicant against the Respondent.

(b) Grounds of relief :

That aforesaid shortage is the outcome of gross negligence and misconduct of the Railway employees concerned and the applicant has suffered loss of Rs. 2,250.

8. Matters not previously filed or pending with any other court. (State whether the applicant had previously filed any claim, writ petition or suit regarding the matter in respect of which the present application has been filed). In case the applicant had previously : Not filed.

Where a petition has been dismissed for default, restoration application may be moved within a period of thirty days from the date of dismissal and on sufficient cause being shown the petition may be restored (Rule 18). Substitution shall be made within thirty days, on failure the application for compensation shall abate (Rule 26).

filed any claim, application, writ petition of suit, indicate the stage at which it is pending, and if decided, attach a certified copy of the order.

9. Jurisdiction of the Bench (indicate the facts on the basis of which the Bench to which application is made, has the jurisdiction. : Barabanki District lies within the jurisdiction of Lucknow Bench of the Railway Claims Tribunal, hence this Hon'ble Bench has jurisdiction to entertain the application.

10. *List of enclosures :-*

1. Application
2. Copy of Notice
3. Copy of Invoice
4. Copy of open delivery
5.
6.

Verification

No. 118—Claim Petition against Railways for Delay in Delivery of Goods

Paras 1 to 6 as in precedent No.117.

7(i) Facts of the case :

(*Give here concise statement of facts in chronological order, each paragraph containing as nearly as possible, a separate issue, fact or otherwise*)—

In regard to matters other than matters covered by section 13(1) of the Railway Claims Tribunal Act, 1987, the jurisdiction of the Civil Court is not barred. A passanger fell out of bogie of the train and died on being caught between the platform and the running train (*Ratnakar Taubaji Itankar* v. *Union of India*, A 1994 Bom 132 DB).

(a) On July 18, 1995 the plaintiff's agent at Calcutta delivered 250 bags containing 250 quintals of sugar to the servants of the defendant at Howrah for despatch by goods train to Jamuna Bridge Station for delivery to the plaintiff, on receiving the freight, and obtained R.R. No. 2341. The goods were booked at railway risk rates.

(b) The usual and reasonable period of transit by goods train from Howrah to Jamuna Bridge is eight days.

(c) The defendant negligently delayed the consignment in transit, and actually delivered it to the plaintiff on September 25, 1995.

(d) In consequence of negligence of the defendant the goods lost in value by a fall in the market price, and thus damage was caused to the plaintiff.

(ii) (a) Decree for recovery of Rs.5,000/- together with the costs of the case and *pendente lite* and future interest at the rate of 2 per cent per month be passed in favour of the applicant against the respondent as per details given below-

Particulars of damages :

Difference between the price in the last week of June (i.e. Rs.1,360 per quintal and on September 25, (i.e. Rs.1,340 per quintal) at Rs.20 per quintal, Rs.5,000.

(b) The aforesaid loss in value by fall in the market price is the outcome of the gross negligence and misconduct of Railway Employees concerned and the applicant has suffered loss of Rs.5,000/-.

Paragraphs 8, 9 and 10 as of the previous precedent No.117

No.119—Claim against Railways for Damage to Goods

Paras 1 to 6 as in precedent No.117

7(i) Facts of the case :

(*Give here a concise statement of facts in chronological order, each paragraph containing as nearly as possible, a separate issue, fact or otherwise*).

Section 17(1)(c) of the Limitation Act would apply only to a suit instituted or an application made in that behalf in the civil suit. The Railway Claims Tribunal is the creature of the statute, therefore, it is not a civil court. The Limitation Act has no

(a) On July 10, 1995, the plaintiff handed over 200 bags of sugar each containing one quintal to the servants of the defendants at Bareilly, for despatch to Muzaffarnagar and for delivery there to the plaintiff or his order.

(b) The servants of defendants accepted the consignment for the aforesaid purpose on the plaintiff executing a forwarding note and paying the Railway freight, and granted Railway Receipt No.789 to the plaintiff. The goods were booked at owner's risk rates.

(c) When the consignment was delivered to the plaintiff's agent at Muzaffarnagar, all the bags were found in a drenched condition and the sugar considerably damaged by water and the plaintiff has suffered damage thereby, amounting to Rs.15,000.

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application and the limitation under section 78 B of the old Act of 1890, is not saved by operation of section 17(1)(c) (*Birla Cement Works* v. *G.M. Western Railway*, JT 1995(2) SC 59, A 1995 SC 1111).

Whether the goods or animals were booked at railway risk or owner's risk must be clearly alleged in the pleadings. The railway is responsible only if the negligence or misconduct of its administration or of its servants is proved, allegations of negligence and misconduct must be made and particulars thereof given. Where however, it is for the railway to escape liability on the ground that there was no negligence or misconduct, their pleas need not be anticipated. The stage at which loss, etc., occurred and if compensation can be recovered only in special circumstances, those circumstances must be alleged.

Who can sue : A suit against a Carrier or Railway for the loss of goods, or for any breach of duty or of contract is, as a general rule, to be brought by the person in whom vests the property in the goods (*Dani Chand* v. *Bhawalka Bros.*, A 1955 SC 182). A Railway Receipt is a document of title (*Commissioner of I.T.* v. *Bhopal Textile Ltd.*, A 1961 SC 426). As between seller and purchaser, the property passes to latter on the seller's delivery to the carrier, who carries the goods as bailee for the purchaser, and the seller in employing the carrier is to be regarded as agent for the purchaser. In such cases, consignee should bring the suit. When, however, property does not pass to the consignee, as in case of goods sent on approval, the consignor alone can bring the suit and also where the consignor has to carry or procure at his own expense the carriage of the goods. When the seller, books the consignment "to self" the property does not pass to the buyer and the buyer cannot sue, but if the railway receipt is handed over to the buyer *on taking the price*, this operates as transfer of the right (*G.G. in Council* v. *Joy Narain*, A 1948 Pat 36).

A consignee who is not the owner of the goods but to whom goods are consigned for sale on commission basis can sue for loss caused to the goods in transit (*Dominion of India* v. *Gaya Pershad*, A 1956 All 338; also see, *Chaganmal*

(d) The servants of defendants employed at Bareilly station loaded the goods during the rainy season in a wagon, the roof of which was damaged and was in the knowledge of the said servants. During the course of journey, the rain water came into the wagon and drenched all the bags of sugar. The servants of the defendants at the junction stations at Moradabad and Hapur saw this but did not arrange have the goods transferred to another wagon.

(e) The said damage to the goods was caused by misconduct of the servants of the defendants.

(ii)(a) A decree for the recovery of Rs.15,000 together with the costs of the case and *pendents lite* and future interest at the rate of 2 per cent per mensem be passed in favour of the applicant against the defendants as per details given below—

Particulars of damages :

Difference between the market value of sugar of the quality of the plaintiff's sugar at Muzaffarnagar on the date of delivery (Rs.1,305 per quintal) and the value which the damaged sugar fetched (Rs.1,230 per quintal) at Rs.75 per quintal on 200 quintals, Rs.15,000.

(b) The aforesaid loss in value by fall in the market price is the outcome of the gross-negligence and misconduct of Railway employees concerned and the applicant has suffered loss of Rs.15,000.

Para 8, 9 and 10 as in precedent No.117.

Harpal Das v. *Dominion of India*, A 1957 Bom 276; *Union of India* v. *West Punjab Factory Ltd.*, A 1966 SC 395). In such a case the consignor does not lose his right to sue (*B.B. & C.I. Railway* v. *Siyaji Mills*, 101 IC 689; see also, *Union of India* v. *W. Punjab Factories*, A 1966 SC 395). Where the goods were not given to the consignor's agent in whose favour Railway receipt had been endorsed, were kept by the railway administration in jetty and not in godown, and the goods caught fire, the railway administration was held responsible for the damages caused to the goods (*Union of India* v. *Hafiz Bashir Ahmad*, 1987 (Supp). SCC 174). In case of short delivery of goods, a consignee can file suit, the fact that he became owner of the goods after the detection of shortage of delivery is immaterial (*Utkal Farm and Road Machinery* v. *Union of India*, A 1995 Mad 185).

The opinion is not uniform on the right of an endorsee of Railway receipt to sue. It has been held in some cases that endorsee can sue and even a blank and unsigned endorsement is sufficient (*Jalan & Sons* v. *Governor-General*, A 1949 East Punjab 190; *State of Bihar* v. *Union of India*, A 1959 Pat 438, *Samrath Lal* v.

No. 120—Claim for Refund of an Overcharge made by the Railway

Paras 1 to 6 as in the precedent No.117.

7(i) Facts of the case (*Give here a concise statement of facts in a chronological order each paragraph containing as nearly as possible, a separate issue, fact or otherwise.*)

(a) On June 20, 1995, the defendants through their servants at Basti station accepted from the plaintiff's agent 50 sleepers for transport by goods train to Bhagalpur, and charged Rs.1,220 from the said agent and granted Railway Receipt No.1262.

(b) The correct charge for the said sleepers according to the schedule laid down in the goods tariff issued and published by the defendants should have been Rs.930.

[*Or*, (b) The defendant's servants at Bhagalpur station said to the plaintiff that charge should have been made not by weight as made at Basti but by measurement and therefore they wrongfully refused to deliver the said sleepers to the plaintiff until the plaintiff paid them an alleged undercharge of Rs. 290, and the plaintiff had therefore to pay, and he did pay on July 1, 1995 Rs. 290 to the defendant's servants at Bhagalpur.

(c) Under the rules laid down in the defendant's goods tariff, the charge was correctly made at Basti].

(ii) Nature of the relief sought:

(a) The plaintiff claims refund of Rs.290 with interest at 1 per cent per mensem by way of damages from the date of overcharge up to date, with further interest upto the date of payment.

Union of India, A 1959 MP 309; *Union of India* v. *Tahar Ali*, A 1952 Ori 126). The Calcutta High Court was of the view that an endorsee cannot sue unless property in the goods had passed to him (*Commissioner Port of Calcutta* v. *General Trading Corporation*, A 1964 Cal 290). The Assam High Court in the case of *Shree Shyam Stores* v. *Union of India*, A 1971 Assam 59, discussed the entire law and held that a mere endorsement of Railway Receipt does not vest the right of suit. The endorsee must prove that the property in goods has also passed to him (*Union of India* v. *Ram Pd Mool Chand*, A 1971 Bom 52). The Supreme Court has, however, held that while an endorsement may pass property in the goods, it does not transfer the contract contained in the receipt on the statutory contract under section 74 F of the old Railways Act. Further that a Railway Receipt cannot be accorded the benefit

(b) Grounds of Relief:

The aforesaid overcharge has been made on account of the negligence on the part of the Railway employees concerned.

Paras 8, 9 and 10 *as in precedent No.117.*

Verification

No. 121—Claim for Loss of Luggage

Paras 1 to 6 as in precedent No.117. The facts may be modified according to the facts of the present case.

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which flow from negotiability so as to entitle the endorsee to sue the carrier. But the plaintiff may prove that he is an assignee of the contract of carriage and may sue as such (*Movi Mercantile Bank Ltd.* v. *Union of India*, A 1965 SC 1954). Where the insurer has paid the amount of the damages sustained to the consignor and the latter has authorised the former to recover the amount from the railways, the insurer can recover the amount from the Railways (*New India Assurance Co. Ltd.* v. *Union of India*, (1995) 2 SCC 417).

Contract or tort: The liability of the carrier may be based on contract or on negligence, sometime it can be based on both. It is sufficient to allege the material facts. Whenever a breach of duty is alleged the facts from which the duty arises must be stated. If the contract is one, the facts of which must be pleaded, in order to establish the duty of which the defendant is alleged to have committed breach, the suit is one on contract. If the facts are such that the plaintiff can show a duty without relying on the contract, the plaintiff may sue in tort in spite of the existence of a contract. For presumption of negligence of Railway *see*, *Union of India* v. *Khalilul Rahman*, A 1971 Cal 347. A man who is no party to a contract may sue for the negligent performance of that contract provided it was entered into with express reference to himself; thus an infant or a servant may recover damages for injuries received in a Railway accident, although his parents or master took his ticket for him. A servant may sue for loss of his own luggage though his master took the ticket. A claim for shortage in weight of goods carried under risk-note is a suit on contract, and when it is so brought it is not competent for court to pass a decree as if the suit was one in tort for damages for delay (*M.& S.M. Railway* v. *Gopal Rai*, 94 IC 510, A 1926 Pat 273).

Luggage: Under section 100 of Railways Act of 1989, the Railway Administration is not responsible for the loss, damage, destruction, deterioration or non-delivery of any luggage belonging to a passenger unless a railway servant has booked the luggage and given a receipt therefor. In case the luggage is carried by the passenger in his own charge, it must be proved in addition that the loss, etc., was due to negligence or misconduct of the railway administration or any of its servants. If compensation for luggage is claimed these facts must be alleged in the application.

7(i) Fact of the case (*Give here a concise statement of facts in chronological order, each paragraph containing as nearly as possible, a separate issue, fact or otherwise*).

(a) On June 6, 1995 the plaintiff purchased a ticket at Lucknow station for journey from Lucknow to Simla by the Railway owned by the defendants.

Personal injury : Suits for personal injury by negligence of Railways are suits based on tort. The liability of the railways in respect of death or injuries caused to bona fide passengers by accidents to trains carrying passengers is governed by section 124 of Railways Act 1989, and that in respect of accidents at sea by section 111 of the Act. If the deceased passenger was travelling without ticket he was not a *bona fide* passenger and his dependants cannot recover compensation (*Sundari* v. *Union of India*, 1984 UPLBEC 612 (All) FB). The accident must be to the train and not mere to the passenger for invoking section 124 (*Union of India* v. *Sunil Kumar*, (1985) 1 CCC 202, SC).

Damages : Plaintiff should try to minimize his damage. If goods have deteriorated he should take delivery and claim loss. If he does not take delivery he cannot claim damages (*Secretary of State* v. *Devi Ditta*, 148 IC 489; *Laduram* v. *Secretary of State*, 59 CLJ 467, A 1934 Cal 834). The measure of damages ordinarily is the value of the goods at the time they should have reached the consignee, and loss of profits is not the ordinary consequence of non-delivery unless special circumstances were brought to defendant's notice (*G.A. Jolli* v. *Dominion of India*, A 1949 Cal 380; *Union of India* v. *Jogendra Chandra*, A 1976 Pat 24). When there is no evidence before the court to prove the value of consignment at destination, the freight paid and the cost price of the consignment is the measure of the value of the consignment (*New Swadeshi Mills* v. *Union of India*, A 1981 All 268). Where the consignor declared the value of the goods, he cannot claim damages exceeding that amount (*Union of India* v. *Sri Rama Silk Factory*, A 1980 AP 47).

Notice : Many suits are lost for want of a proper notice. No suit can be brought against the Railways for refund of an over-charge in respect of goods or animals, or for compensation for the loss, damage, destruction, deterioration or non-delivery of animals or goods delivered to be carried, unless the claim has been preferred in writing to the Railway administration within six months from the date of delivery of the animals or goods for carriage by the Railway (section 106). It is not necessary that the claim should be in the form of a notice. It may be in the form of application or in any other form, such as a letter (*Bala Prasad* v. *B.N.W. Railway Co.*, 106 IC 311, A 1927 Oudh 478 DB). Such notice may be served, in the case of State Railways on the Chief Commercial Manager (*Shamsul Haq* v. *Secretary of State*, A 1930 Cal 332); or General Manager or General Traffic Manager (*Shamji* v. *N.W. Railway*, A 1947 Bom 169, 48 BLR 698) and a notice sent to any subordinate official of the Railway will be of no avail (*Cawnpore Cotton Mills* v. *G.I.P. Railways*, 21 ALJ 223, *Ram Sahai* v. *E.I. Railway*, 20 ALJ 644; *Sahebdin* v. *E.I. Railway*, 13

(b) The luggage of the plaintiff was booked by the defendant's servants at Lucknow for being carried to Simla in the luggage van, and a receipt No. 243 was given to the plaintiff for the same. (*Or, if the luggage was in the charge of the plaintiff* "was being carried in the charge of the plaintiff in the carriage in which he was travelling").

(c) The defendant's servants did not carry the said luggage to Simla but by negligence and misconduct lost it upon the said journey or have retained it, whereby the plaintiff has suffered damage. (*Or*, by the negligence of the defendant's servants the carriage caught fire and the goods were destroyed).

(ii) A decree for the recovery of Rs.5,000 together with costs of the case with *pendente lite* and future interest at the rate of 2 percent per month be passed in favour of the applicant against the defendants.

(b) The aforesaid loss of luggage is outcome of the gross negligence and misconduct of the Railway employees concerned.

Paras 8, 9 and 10 as in precedent No.117.

Verification

No. 122—Application for Compensation for Death, Injury in Train Accident

(*Form II, Appendix XXVII, Railway Claims Tribunal (Procedure) Rules 1989*)

I, ...son/daughter/wife/widow of .....

residing at .....having been injured in

OLJ 15, 3 OWN 156, 93 IC 22). A joint notice to the Superintendent-General and Agent was held sufficient (*Bhayyalal* v. *Agent B.N. Railway*, A 1944 Nag 262).

A notice under section 80, C.P.C. is further necessary if government has to be sued as in case of State Railways (*Ali Asmat* v. *G.I.P. Railways*, 124 IC 711; *A. Jamal Noor Md.* v. *G.G. in Council*, A 1947 Cal 26) and notice under section 106 (formerly 78-B) Railways Act only is not sufficient (*Secretary of State* v. *Fazluddin*, 1932 ALJ 1033; *N.W. Railway* v. *Dwarka*, A 1931 Pat 393; *Balak Ram* v. *Secretary of State*, 1935 ALJ 908). Notice under section 80 should be served as required by that section and service on Manager of the Railway or on Collector is not sufficient, nor on Secretary Railway Board (*Kumar Bros.* v. *Governor-General*, A 1949 Lah 165). It is open to a party to give a combined notice satisfying the requirements of both sections 80, C.P.C. and section 106, Railways Act (*The G.I.P. Railway* v. *Mageti*, 109 IC 406, A 1928 Mad 599, 1928 MWN 218).

railway accident hereby apply for the grant of compensation for the injury sustained.

Or,

I, ..., son/daughter/wife/widow of ..... residing at .....hereby apply as dependent for the grant of compensation on account of the death/injury sustained by Shri/Kumari/ Shrimati .....son/daughter/ wife/widow of Shri/ Shrimati..... son/daughter/wife/widow/widow of Shri/ Shrimati ..... who died/was injured in the railway accident referred to hereunder.

Necessary particulars in respect of the deceased/injured in the accident are given below :

1. Name and father's name of the person injured/dead (husband's name in the case of married woman or widow).
2. Full address of the person injured/dead.
3. Age of the person injured/dead.
4. Occupation of the person injured/dead.
5. Name and address of the employer of the deceased, if any-
6. Brief particulars of the accident indicating the date and place of accident and the name of the train involved :-
7. Class of travel, and ticket/pass number, to the extent known.....
8. Nature of injuries sustained along with medical certificate.
9. Name and address of the Medical Officer/Practitioner, of any,

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A claim under section 106 is not necessary in cases not covered by that section. Although in a claim for refund of overcharge, a notice is necessary, the Allahabad High Court took an equitable view in a case where such notice was physically impossible and held that suit could be maintained without such notice. In that case overcharge was made at the time of the delivery at destination which took place more than 6 months after delivery to railway by the consignor (*Sheo Dayal* v. *G.I.P. Railway*, 97 IC 474, A 1926 All 698, 25 ALJ 89 DB). Under the old section 77, it was held that a notice was not necessary in cases of detention or conversion, e.g., where railway admittedly in possession of goods fails to hand them over to the owner (*Haryana Cotton Mills* v. *B.B. & C.I. Railway*, 102 IC 149, 8 Lah 555; *Shamshul Haq* v. *Secretary of State*, A 1930 Cal 332), or in other cases of tort (*Sundarji* v. *Secretary of State*, 152 IC 995, A 1934 Pat 507).

who attended on the injured/dead and period of treatment .....

10. Disability for work, if any, caused.
11. Details of the loss of any luggage on account of the accident.....
12. Has any claim been lodged with any other authority? If so, particulars thereof.....
13. Name and permanent address of the applicant.....
14. Local address of the applicant, if any.....
15. Relationship with the deceased/injured.....
16. Amount of compensation claimed.....
17. Where the application is not made within one year of the occurrence of the accident, the grounds thereof .....
18. Any other information or documentary evidence that may be necessary or helpful in the disposal of the claim.....
19. Mention the documents, if any, filed along with application.

I,.....solemnly declare that.....

(a) the particulars given above are true and correct to the best of my knowledge and

(b) I have not claimed or obtained any compensation in relation to the injury/death which is the subject matter of this application.

Signature or left thumb-impression of the applicant.

Date.....

Place.....

Name of witness and his address in case left thumb impression is put by applicant.

The words "loss of goods" used in section 106 mean loss or destruction or deterioration of the goods and consequent loss to the owner thereof (*G.G. in Council* v. *Musaddilal*, A 1961 SC 725).

Section 96 of the new Railways Act 1989 (sections 76D and 76E of the old Railways Act, 1890) govern the responsibility if goods are carried on two or more

No. 123—Application for Refund of Fares or Freight

(Form III, Appendix XXVII, Railway Claims Tribunal (Procedure) Rule 1989)

Paras 1 to 4 as in Precedent No. 117

5. Full particulars of payment of fare/freight.

(1) Claim for refund of freight.

Date of Booking	Railway Receipt or Parcel Way Bill	Station From	To	Description of consignment
1	2	3		4
Freight paid	Amount Refund of Claims		Money Receipt/Credit Note or other payment particulars	
5	6		7	

(2) Claims for refund of fare

Date of journey	Train No.	Class of Travel	Class actually travelled
1	2	3	4
Ticket or Ticket Deposit Receipt/ Excess Fare Ticket, etc., Guards or Conductors, Certificate		Fair Paid Rs.	Refund Claimed Rs.
5		6	7

6. Date on which notice served in Railway Administration under section 106 Railways Act, 1989 (in respect of claims for refund of freight)—attach proof.

railway administrations or other transport systems and over railways in India and foreign countries. It is, open to the plaintiff to sue all the administrations or systems concerned or only such of them as he holds responsible for the compensation he is claiming. But the non-booking administrations can be made liable only if loss occurred on their railway and the new section does not enhance the liability which is still governed by section 80 Railways Act (*Union of India v. Brij Lal*, A 1969 SC 817 para 10).

7. *(i)* Facts of the case:

(Give here a concise statement of facts in a chronological order, each paragraph containing as nearly as possible, a separate issue, fact or otherwise.)

(ii) (a) Name of relief sought; and

(b) Grounds of relief.

8. Matters not previously filed or pending with any other Court.

(State whether the applicant had previously filed any claim, writ petition or suit regarding the matter in respect of which the present application has been made).

Place of Suing : Section 109 of the Railways Act, 1989 (section 80 of the old Act, of 1890) is a self-contained provision with regard to the choice of forum for such suits. There is implied repeal of the provisions of section 20 CPC and section 18 of the Presidency Small Cause Courts Act. The words "may be instituted" in section 109 are equivalent to "shall be instituted" (*Ratan Lal Adukia* v. *Union of India*, A 1990 SC 104; *Union of India* v. *Ratan Lal Adhukia*, A 1987 Cal 311 (FB) affirmed; *Hindustan Machine Tools Ltd.* v. *Union of India*, A 1985 Mad 130; and *Assam Cold Storage* v. *Union of India*, A 1971 Assam 69 overruled).

Limitation period is of three years for suits for compensation for loss or non delivery of goods. It runs in the case of a suit for compensation for losing or injuring goods, from the time when the loss or injury occurs, and in a suit for non-delivery of or delay in delivering goods, from the time when the goods ought to have been delivered (Articles 10 and 11).

The limitation period for filing claim petitions against Railways is now governed by section 17 of Railway Claims Tribunal Act, 1987. For compensation for loss, destruction, damage, deterioration or non-delivery of animals or goods entrusted to railway administration for carriage by railway, the limitation period is three years from the date on which the goods in question were entrusted to the railway administration. The claims for refund of fares and freight is three years from the date of payment. Claim can be filed only after the expiration of three months next after the notice required under Sec. 106 of the Railways Act, has been served.

For compensation for death or injuries as result of railway accident, and for compensation payable under sections 124 and 124 A of the Railway Act, 1989, the limitation period is one year from the date of the occurence of the accident.The delay may be condoned by the tribunal on sufficient cause being shown.

Defence : The Railway may plead that the loss, etc., was due to one of the causes mentioned in section 93 and that they had used reasonable foresight and care. They may also plead any special agreement as exempting them from liability. They may plead omission of claim under section 106. They may plead that the parcel or package contained articles of the class mentioned in the 2nd Schedule of

In case the applicant had previously filed any claims application, writ petition or suit, indicate the stage at which it is pending, and if decided, attach a certified copy of the Order.

9. Jurisdiction of the Bench (indicate the facts on the basis of which the Bench to which application is made, has the jurisdiction).

10. List of enclosures :

Verification

RECTIFICATION *(nn)*

No. 124—Suit for Rectification of a Sale-Deed

1. The plaintiff is owner of the houses No. 325 and 325-A in Ramnagar, Tahsil Rampur, District Ambala.

2. On December 14, 1994, the plaintiff agreed to sell and the defendant agreed to purchase, for consideration, a one-third share in the said house No. 325 only.

3. On December 15, 1994 a sale-deed was drawn up under the direction of the defendant, and was signed by the plaintiff and registered the same day.

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the Railways Act and were of value exceeding Rs.100 but were not insured. The railway may also plead (section 93) that the subject-matter of bailment was seized by some authority of law, exercised through regular and valid proceedings (*Jugilal Kamlapat Oil Mills* v. *Union of India*, A 1976 SC 227). Where the delivery of the goods is not taken within seven days after the expiry of free time allowed for the removal of the goods under Sec. 99 and thereafter the consignment of goods is delivered to a wrong person, the Railways can claim protection under Sec. 99(2) and are not liable for damages (*St. Joseph Textiles* v. *Union of India*, A 1993 SC 1692).

(*nn*) An instrument can be rectified by court at the instance of a party to it, if, by reason of a mutual mistake or fraud, it does not express the real intention of the parties (section 26, Specific Relief Act).

If the instrument is a decree, it has been held in some cases (*Bala Prasad* v. *Kannu*, 14 IC 41; *Bepin* v. *Jageshwar*, 66 IC 345, 26 CWN 36, 34 CLJ 256; *Upadrashta* v. *Gudapartu*, 103 IC 384 Mad; *Moorudin* v. *Md. Omar*, A 1940 Bom 321), that rectification can be by suit. In *Azizullah Khan* v. *Court of Wards*, A 1932 All 587, however, it was held that the decree could be amended under section 152 C.P.C. The section was, however, held to be inapplicable in *Umashankar* v. *Ram Agyab*, A 1939 All 231 and *Shujat Mand Khan* v. *Govind Behari*, A 1934 All 100, but it was not decided in these cases as to whether a suit would lie. A suit of rectification of decree was held to be maintainable in *Kistoormull* v. *Sattar Md.*, A 1958 Raj 276. It

4. In the said sale-deed, the property is described as a "one-third share in house No. 325 and 325-A and the defendant has thereby become owner of more property than the plaintiff had contracted to sell.

5. The aforesaid wrong description of the property sold was procured in the sale-deed by the defendant fraudulently.

Particulars of the Fraud : The defendant falsely and fraudulently represented to Duni Chand, the scribe of the sale-deed, that the plaintiff had agreed to sell a one-third share in the both houses, aforesaid and induced the said Duni Chand by the said representation to enter the said wrong description of property sold in the sale deed. After the deed had been drawn up, the defendant fraudulently represented to the plaintiff that it correctly described the terms of the agreement of the parties and, by this representation, which was false and which the defendant knew to be false, he induced the plaintiff to affix his signatures to the deed. (*Or*, the defendant entered into an unlawful conspiracy with Duni Chand, the scribe, with a view to cause injury to the plaintiff and, in pursuance of that conspiracy, the said Duni Chand entered the aforesaid wrong description of the property in the sale-deed, and the defendant represented falsely and fraudulently to the plaintiff that the deed contained fully and correctly the terms of the contract between the parties. Further, when the said Duni Chand read out the contents of the sale-deed to the plaintiff, he read out the description of the property according to the agreement between the parties and contrary to what he had written in the sale deed).

6. In the alternative, the plaintiff says that the description of the said property was wrongly written in the sale deed by reason of mutual mistake of the parties, and both the parties remained under the impression that it was correctly entered according to the agreement.

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is not absolutely necessary that an instrument should be rectified by a suit. If a suit is brought upon it, the defendant may plead facts entitling him to rectification and the court will then pass a decree upon it according to its true intention, or the party aggrieved may sue for a declaration of his title under the instrument as it should be pleading facts which will entitle him to rectification (*Palani* v. *Nechappa*, 53 IC 379 Mad; *Sabaji* v. *Nawal Singh*, 104 IC 736 Nag). If inspite of wrong description of property sold, right property has actually been transferred to the vendee's possession, the latter's title is good and though he may not have brought a suit for rectification of sale deed he can always show by oral evidence that the property in his possession was really intended to be transferred (*Kesho Singh* v. *Roopan*

The plaintiff claims that the said sale-deed be rectified by substitution of the words and figures "house No.325" for the words and figures "house No. 325 and 325-A" in the description of the property sold as given in the said sale deed.

RESCISSION OF CONTRACT *(oo)*

No. 125—Suit for Rescission on the Ground of Misrepresentation

1. On December 22, 1994, the defendant represented that he was the exclusive owner of the house detailed at the food of the plaint and that he had no sons or any other member of a joint family having any interest in the property.

Singh, 100 IC 568 All; *Raja Ram* v. *Manik*, A 1952 Nag 90). A transfer in excess of the legal rights of a transferor does not entitle a transferee to have the instrument of transfer rectified (*Ratneswar Goswami* v. *Mangoli Chutiani*, A 1951 Assam 70). **The plaintiff should allege in the plaint what the intention of the parties to the instrument was, and the fact that it was not correctly expressed in the instrument, showing exactly the variance between the intention and its expression. He must next allege the fraud (with particulars) or the mistake which caused the discrepancy. In case of mistake it must be alleged that it was mutual, for a unilateral mistake is no ground for rectification** (*Bepin* v. *Jogeshwar*, 34 CLJ 256). The claim may be based alternatively on fraud and on mutual mistake. **The plaintiff must show substantial injury to him,** as the relief, being discretionary, will not be granted if the error is not substantial.

Court fee : should be paid on the value of the subject-matter of the suit *i.e.*, according to the value of the benefit which the plaintiff will derive from the rectification.

Limitation : is three years under Article 113 from the time when the cause of action accrues.

Defence : The defendant may deny the alleged fraud or may show that there is no error in the instrument. If he is a transferee from the original party, he may plead that he is a *bona fide* transferee for value, and rectification cannot be granted so as to prejudice his rights.

(*oo*) A contract can be rescinded under section 27, Specific Relief Act, 1963, if it is voidable or terminable by the plaintiff, or when it is unlawful for any cause apparent on the face of it and the defendant is more to blame than the plaintiff. When the defendant purchaser had obtained a decree for specific performance and he makes default in payment of the purchase money or other sums, the plaintiff must apply to have the contract rescinded (section 28), though if the decree is properly framed and the defendant's suit is dismissed on such default, it would hardly be necessary for the plaintiff to have the contract rescinded. A separate suit

2. The plaintiff was thereby induced to purchase the same in the belief that the said representation was true, and he signed an agreement on the said December 22, 1994, and paid Rs.2,000, as earnest money, but the property has not yet been transferred to him.

3. On March 4, 1995 the plaintiff came to know that the defendant has got two minor sons who are the members of a joint Hindu family with him, and have got an interest in the aforesaid property.

The plaintiff claims :

(1) Rescission of the contract.

(2) Cancellation of the agreement of December 22, 1994.

(3) Refund of Rs.2,000, with interest from the date of suit to that of payment.

Details of the House

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No. 126—Suit for Rescission on the Ground of Fraud

1. By an agreement in writing, dated January 4, 1996, the plaintiff agreed to purchase from the defendant, the house detailed at the foot of the plaint, for a consideration of Rs.3,20,000 and the plaintiff paid Rs.25,000 to the defendant as earnest money.

2. In order to induce the plaintiff to make the said contract and to execute the said agreement and to pay the said money, the defendant

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for rescission of contract will not lie in view of sub-section (4) of section 28. **The plaint in a suit for rescission must contain allegations (1) of the contract, and (2) of the grounds on which it is sought to be rescinded.** If fraud, undue influence, etc., are alleged as the ground, particulars of the same should be given. An allegation that the contract is unlawful is not sufficient. It must be shown that the unlawfulness is apparent on the face of the contract and that the parties are not in *pari delicto*.

Limitation : Three years from the date when the facts entitling the plaintiff to the relief became known to him (Article 59). **The date of such knowledge** should also be alleged in the plaint.

Court-fee : must be paid on the value of the relief, as in the case of "Cancellation".

Defence : Besides denying the existence of the grounds on which rescission is claimed, a defendant may pray for restoration of the benefit which the plaintiff has received under the contract (section 30, Specific Relief Act, 1963). In a suit for rescission on the ground of mistake, the defendant may plead that his position has

represented to the plaintiff that the monthly rent of the said house was Rs.2,000.

3. The plaintiff was induced to, and he did make the said contract and execute the said agreement, and did pay the said money, on the faith of said representation.

4. The plaintiff has since discovered, on March 15, 1996, and the fact is, that the said representation was false and that, as a matter of fact, the monthly rent of the said house was, and is only Rs.500.

5. The defendant made the said representation fraudulently, knowing well that it was false.

The plaintiff claims :

1. Rescission of the contract.

2. That the said agreement may be delivered up and cancelled.

3. Refund of Rs.25000 with Rs. _____ on account of interest by way of damages, and further interest from the date of suit to that of payment.

Details of the House

* * * *

No. 127—Suit for Rescission of a Contract on the Ground of Mistake

(Form No.34, Appendix A, C.P.C.)

1. On the ___ day of _____19___, the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant situated at _____, contained [ten *bighas*].

2. The plaintiff was thereby induced to purchase the same at the price of Rs._____in the belief that the said representation was true, and signed an agreement, of which the original is hereto annexed. But the land has not been transferred to him.

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been so substantially changed by the contract that he cannot be restored to his original position if the contract is rescinded. When the ground is unlawfulness of the contract, he may plead that the plaintiff was equally, if not more, to blame. He may plead that the contract is void *ab initio*, hence there is no necessity for its rescission. If rescission is claimed on the ground of misrepresentation, he may plead that the plaintiff had means of discovering the truth with due diligence or that the contract was not caused by such misrepresentation and the plaintiff knew the

3. On the ___ day of _____ 19__, the plaintiff paid the defendant Rs._____ as part of the purchase money.

4. That the said piece of ground contained in fact only [five *bighas*].

The plaintiff claims :

(1) Rs.___ with interest from the___ day of _____ 19___;

(2) that the said agreement be delivered up and cancelled.

SALE OF GOODS

No. 128—Suit for Price of Goods Sold at Fixed Price and Delivered

(Form No.3, Appendix A, C.P.C.)

1. On the__ day of _____ 19__, *EF* sold and delivered to the defendant (one hundred barrels of flour, *or*, the goods mentioned in schedule hereto annexed, *or*, sundry goods).

2. The defendant promised to pay Rs._____ for the said goods on delivery (*or*, on the ___ day of _____ 19__ , *some day before the plaint was filed*).

3. He has not paid the same.

4. *EF* died on the ___ day of _____ 19__. By his last will he appointed his brother, the plaintiff, his executor.

The plaintiff as executor of *EF* claims (*relief claimed*).

No. 129—Suit for Price of Goods Sold and Delivered when no Price was Fixed *(pp)*

1. On January 4, 1994, it was verbally agreed between the plaintiff and the defendant that the plaintiff should sell, and deliver to the defendant at Hapur, any grain and sugar ordered by the latter, that the defendant should pay the price on delivery and that if the price was not so paid, the defendant should pay interest at 9 per cent per annum.

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true facts (section 19, Contract Act). The defendant may claim the benefit of section 64, Contract Act. (*Muralidhar* v. *International Film Co.*, A 1943 PC 34).

(pp) **The contract of sale must be alleged, as also the agreement to pay the price.** If price was not settled, a reasonable price can be claimed under section 9, Sale of Goods Act, 1930 and, in such a case, the plaintiff must allege in the plaint what he claims to be the reasonable price. **It should be distinctly alleged when the price was agreed to be paid, whether before the goods were received from the**

2. From January 4, 1994 to October 14, 1995, the plaintiff sold and delivered to the defendant under the latter's instructions contained in letters received by the plaintiff, wheat and sugar from time to time, particulars of which are stated in the account given below.

3. No price was fixed between the parties, but according to the market rates prevailing at the time of the said sales, the price and other costs of the goods sold came to Rs.54,337. The defendant made payment of Rs.22,000 only in total. Particulars of the amount due from the defendant, of the payments made by him, and of the interest due to the plaintiff, are given in the account at the foot of the plaint. Under the said account, Rs.32,524 is now due from the defendant to the plaintiff.

The plaintiff claims Rs.32,524 with interest from the date of suit to that of payment.

No. 130—Suit for Price of Goods Sold at a Reasonable Price and Delivered when no Price was Fixed

(Form No.4, Appendix A, C.P.C.)

1. On the ___ day of _____ 19__, plaintiff sold and delivered to the defendant (sundry articles of house-furniture), but no express agreement was made as to the price.

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plaintiff's premises, or on their reaching the defendant or after a specified time, for no suit can be brought until the price becomes payable. The delivery of goods should further be alleged. If it was not made personally to the defendant, it should be specified how it was made. Delivery to a carrier would be sufficient only if the defendant has been placed in a position to claim delivery threreby from the carrier or if the carrier was a nominee of the defendant (*Narain Singh* v. *Tulsiram*, 174 IC 932, A 1937 Lah 785). If the suit relates to a series of sales, all made under one agreement, the agreement may be alleged in the beginning and then sales may be alleged either each specifically or, if the number is large, they may be detailed in particulars appended to the plaint. Expenses and costs can be claimed only when contracted for, or when they were necessary for the fulfilment of the contract. Cost of notice of demand, or of sending a man to the defendant to realise the balance due cannot be claimed from the defendant unless there was an express agreement for its payment (*Majety* v. *Cuppalla*, 109 IC 649, A 1928 Mad 476). In the absence of an agreement, price of goods is presumed to be payable where the seller resides (*Firm of Hardial* v. *Bathal Das*, 118 IC 898 Lah). No person can be fastened with liability for the price of goods solely on the basis of entries in the books of accounts even where such books of accounts are kept in the regular course of business. There

2. The goods were reasonably worth _____ rupees.

3. The defendant has not paid the money.

No. 131—Suit for Damages for not Accepting Goods Purchased *(qq)*

1. The defendant, by a letter of January 14, 1995, asked the plaintiff to sell to him 100 qtls. of sugar, at the market rate, and send it to an agent at Patna for delivery to the defendant on receipt of the price.

2. On January 20, 1995, the plaintiff sent 100 qtls. of sugar to the firm of Rajalal Ram Gopal at Patna, and instructed them to deliver the same to the defendant on receipt of the price and cost of transport.

3. The said firm duly tendered the said goods to the defendant, who on February 5, 1995, refused to accept delivery of the said sugar or any part thereof, or to pay the price to the said Rajalal Ram Gopal. The plaintiff has thereby suffered damage.

Particulars

Difference between the price at the market rate on January 20, 1995, at Hapur (Rs.1320 per qtl.) and that at the market rate on

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must be further evidence to prove the receipt of goods by the person who is sought to be made liable for payment (*Hada Steel Products Ltd.* v. *Emjay Engineering Enterprises*, A 1995 P&H 327).

Limitation : Three years under Articles 14, 15, 16 or 17 as the case may be.

Defence : The defendant may plead that goods sent were not according to order or were short of what are entered in the invoice. He may question the rate claimed if none was agreed upon. He may question his liability to pay other incidental expenses. When a number of goods which are indentical are agreed to be sold, it can be pleaded that specific goods were not sold (*Provincial Automobile Co. Ltd.* v. *State of M.P.*, 1952 NLJ 149).

If the goods were sold with a warranty, breach of the warranty is no defence, though the vendee may claim compensation for the breach by way of equitable set-off. A breach of an express or implied warranty does not give the buyer a right to rescind the contract or to treat it as repudiated (*Kisen Chand* v. *Ram Pratap*, 44 CWN 505; *Ghulam Md.* v. *Granver*, 42 PLR 172). But if they were sold with a condition, the breach of it gives rise to a right to treat the contract as repudiated, *see* section 12, Sale of Goods Act, 1930.

(qq) It should first be determined whether the property in goods has or has not passed to the purchaser (See sections 19 to 24, Sale of Goods Act; *Prem Singh* v. *Deb Singh*, A 1948 PC 20; *Hoe Kim Singh* v. *Maung*, 62 IA 242; *Controller of*

February 5, 1995, at Patna (viz, Rs.1300 per qtl.) at Rs.20 per qtl. on 100 qtls. ... ... Rs. 2,000

Cost of transport from Hapur to Patna ... Rs. 1,500

Total Rs. 3,500

The plaintiff claims Rs.3,500, with interest, from date of suit to that of payment.

No. 132—Suit for Deficiency upon a Re-sale (Goods Sold at Auction)

(Form No.6, Appendix A, C.P.C.)

1. On the ___ day of _____19__, the plaintiff put up to auction sundry [*goods*], subject to the condition that all goods not paid for and removed by the purchaser within [*ten days*] after the sale should be re-sold by auction on his account, of which condition the defendant had notice.

2. The defendant purchased [*one crate of crockery*] at the auction at the price of ____ rupees.

3. The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [*ten days*] after.

4. The defendant did not take away the goods purchased by him, nor pay for them within [*ten days*] after the sale nor afterwards.

5. On the ___ day of _____19__, the plaintiff resold the [*crate of crockery*], on account of the defendant by public auction, for ____ rupees.

6. The expenses attendant upon such resale amounted to __ rupees.

7. The defendant has not paid the deficiency thus arising, amounting to____rupees.

Customs v. *Pednekar & Co.*, A 1976 SC 1408). If the property has passed even though the goods may still be in possession of the seller, the seller should sue for recovery of the contracted price [section 55(1)] or he may, under section 54(2) if property in the goods has passed to the buyer subject to lien of the unpaid seller, resell the goods after giving a reasonable notice to the buyer and sue the buyer for any loss sustained by such re-sale, but re-sale must be made within a reasonable time (*Nikkumal* v. *Guru Prasad*, 134 IC 777, A 1931 Lah 714; *Chidambara Nadar* v. *Vadivel*, 159 IC 1031, A 1936 Mad 47). If sale is held without notice and results in loss no damages can be claimed (*Kalka Pershad* v. *Harish Chandra*, A 1957 All 25). In such cases he cannot sue for the unpaid price (*Chidambara Nadar* v.

No. 133—Suit for Price of Goods Purchased but not Accepted by the Defendant

1. By a verbal agreement, on April 20, 1995, the defendant purchased 40 bags containing 40 quintals of sugar from the plaintiff at Rs.1318 per quintal and it was agreed that the plaintiff should weigh the sugar and put it into bags and keep them ready for being delivered to the defendant's order.

2. On May 7, 1995, the plaintiff filled and set apart in his godown 40 bags of sugar appropriating them to the said agreement, and verbally informed the defendant at his shop the same day of the said appropriation, and the defendant promised to take delivery of the said bags within one week.

3. The defendant has not yet taken delivery of the said bags nor has he paid their price or any part thereof.

The plaintiff claim Rs.52,720, with interest from date of suit to that of payment.

No. 134—Suit for not Accepting Delivery of Part and for Price of Part Accepted

1. On August 15, 1980, at Delhi the defendant, placed an indent No.169, signed by the defendant, for 18 cases of coloured glazed paper, each case containing 50 reams, at Rs.120 per ream, to be delivered at Delhi in three lots of six cases each in October, November and December, 1980. The plaintiff accepted the said indent by letter of acceptance, dated August 20, 1980.

2. The plaintiff, accordingly, delivered two lots each of six such cases of the said paper in October and November, 1980, to the defendant who accepted the same.

3. The plaintiff was ready and willing to deliver the remaining six cases in December according to the contract referred to in paragraph 1 above but the defendant, by his letter dated December 14 and received

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Vadivel, A 1936 Mad 47, 159 IC 1031). Where re-sale is made after undue delay, it cannot afford a basis for assessment of damages, which, in such a case, should be calculated on the difference between the market rates (*Jasratmal* v. *M L. Jain & Co*., 39 PLR 945; *Mohan* v. *Khuda*, 184 IC 43, A 1939 Lah 260).

by the plaintiff on December 18, 1980, wrongfully refused to accept or pay for the same, whereby the plaintiff lost the benefit of the said contract.

4. The defendant has not paid the price of 12 cases actually delivered.

Particulars : Price of 12 cases (600 reams)
delivered, at Rs.120 per ream Rs.72,000
Difference between the contract price and
market on December 18, 1980 of 6 cases (300 reams)
at Rs.2 per ream ... ... Rs. 600

The plaintiff claims Rs.72,600 with interest from date of suit to that of payment.

No. 135—Suit for Damages for not Accepting Goods and, in the Alternative, for Loss on Re-sale

1. By an agreement in writing, dated March 14, 1980, executed by the parties at Delhi, the plaintiff agreed to sell, and the defendant agreed to buy, 25, cases of white shirtings, D1, each case containing 50 pieces, at Rs.50 per piece, delivery to be in one lot in May, 1980. The defendant agreed by the said agreement to take delivery of the goods, and to pay for them, on delivery at Delhi.

2. The said 25 cases arrived at Delhi on May 14, 1980, and the defendant accepted delivery of, and paid for, 10 of such cases.

3. At the request of the defendant the plaintiff, from time to time agreed to postpone delivery of, and store for the defendant for a reasonable time, the remaining 15 cases upon the defendant's undertaking to pay all cartage, housing and warehousing charges and interest upon the price of the said 15 cases.

Particulars

The said requisites are contained in, or to be implied from, various letters exchanged between the parties from May 16, 1980, to May 30,

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If the property in the goods has not yet passed to the purchaser, the seller can only sue for damages for breach of contract to purchase and, in such cases, the sum which is recoverable is usually the difference between the contract price and the market price on the date on which the breach of contract has taken place (*Ishwar Das* v. *Dhanpat Rai*, 106 IC 57, 8 Lah 514, A 1927 Lah 687 DB; *Sital Prasad* v. *Ranjit Singh*, 1931 ALJ 390, A 1931 All 583). The seller has no right of resale in

1980, and the said undertakings and each of them are to be implied from the said requests and the previous dealings and courses of business between the parties.

4. By a registered letter dated August 20, 1980 the plaintiff by their agents gave to the defendant notice of their intention to sell the said goods and the defendant did not within reasonable time, or at all, tender the price, and on September 4, 1980, the plaintiff re-sold the said goods through Messrs. Chandra Kishore and Sons, Public Auctioneers, Delhi, realising thereby the sum of Rs.____

The plaintiff claims :

(1) Rs.____, as the loss on re-sale of the said 15 cases.

(2) Rs.____, on account of the expenses of carting and warehousing the said 15 cases.

Particulars of expenses _____.

Alternatively,

Rs._____ as damages for not accepting the said 15 cases purchased by the defendants.

Particulars : Difference between the contract price and market price on May 14, 1980, of the 15 cases containing 750 pieces at Rs. ___ per piece Rs._____

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such cases (*Ambalrana Chettiar* v. *Express News Papers Ltd.*, A 1968 SC 741). The Contract Act applies to sale of goods also (*B. Muriswami* v. *B. Muriswami*, A 1944 Mad 418). On sections 73 and 74, Contract Act, see discussion of case law in *H.P. State Forest Corpn.* v. *Harichand*, A 1984 HP 51. If the seller has re-sold the goods, he cannot recover the loss sustained by such re-sale (*Firm of Ganga Ram* v. *Kadoomal*, 88 IC 571, A 1925 Sindh 222 DB), unless the re-sale was authorised by the contract. Section 62 does not bar such a contract (*Sheonarain* v. *New Sevan Sugar Refining Co.*, A 1938 All 272, 175 IC 552, 1938 ALJ 227). But where the price is payable on a fixed day irrespective of delivery, the seller can sue for the price although the property has not yet passed to buyer and the goods have not been appropriated to the contract, section 55(2). As to when the property in goods sold passes to the buyer, *see* sections 18 to 25, Sales of Goods Act. There is no objection to a suit being brought alternatively for price of goods and for damages for not accepting the goods, or for loss sustained on re-sale on the allegation that property in the goods has passed to the buyer and for damages for not accepting goods. When it is doubtful whether the property has or has not passed, or when there is a suspicion that the defendant may deny the facts which are alleged by the plaintiff

And, in either case :

Interest on the amount decreed from the date of suit to that of payment.

No. 136—Suit for Balance Due on Account of Mutual Sales and Purchases of Shares

1. The defendant purchased from the plaintiff :

(*i*) On July 2, 1995, 100 ordinary shares of the Presidency Jute Mills Co. Ltd., at Rs.16.40 per share; and

(*ii*) On July 18, 1995, 1000 ordinary shares of the Madan Theatres Ltd., at Rs.13.40 per share.

2. On August 10, 1995, the defendant sold to the plaintiff 150 ordinary shares of the National Co. Ltd., at Rs.27.80 per share, 100 ordinary shares of Clive Mills Co. Ltd., at Rs.35.40 per share, and 50 ordinary shares of Lansdowne Jute Co. Ltd., at Rs.275 per share.

3. The defendant did not give or take delivery of the shares sold or purchased by him as aforesaid, at the time of such sales or purchases, but asked the plaintiff to wait, and the plaintiff agreed to wait, for the defendant to perform his obligations.

4. It was verbally agreed between the parties on July 2, 1995, that in respect of the shares purchased by the defendant from the plaintiff the defendant would pay interest at 9 per cent per annum on the price of the shares as from due dates mentioned in the contracts and on all sums due by the defendant to the plaintiff for the time being. The defendant further agreed to keep the plaintiff indemnified and protected in respect of any loss that the plaintiff might suffer by reason of his entering into transactions for shares with the defendant or at the request of the defendant.

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as showing the passing of ownership in the goods, it is always advisable to bring the suit in the alternative form.

The plaintiff must allege the contract for sale, with necessary terms. In an ordinary case of refusal to accept the goods and to pay for them, the plaintiff must allege his tender and defendant's refusal. In a claim for price the plaintiff must allege facts showing that the property or ownership in the goods has passed to the defendant or allege that the price was agreed to be paid on a fixed day irrespective of delivery. If the claim is for loss on re-sale notice to the defendant must be alleged.

5. On October 4, 1995, the defendant sold back 50 ordinary shares of Presidency Jute Mill Co. Ltd., at Rs.16.20 per share. The remaining 50 shares were sold back by the defendant before November, 1995, and all dues in respect of the said 50 shares were paid. The interest on the price of shares due by the defendant to the plaintiff amounted to Rs._____ and, after deducting Rs._____ due to the defendant on account of difference in the price of 50 shares, the defendant remained liable to pay to the plaintiff Rs._____.

6. On September 5, 1995, the defendant purchased back from the plaintiff the aforesaid 150 ordinary shares of the National Co. Ltd., as follows : 75 shares at Rs.26.10 and 75 shares at Rs.28.20 per share. The difference in price amounted to Rs._____. due by the plaintiff to the defendant. After setting off the transaction and deducting Rs._____. on account of interest, the defendant became entitled to get Rs._____.. from the plaintiff.

7. The defendant put off from time to time the delivery of the 100 shares of the Clive Mills and the 50 shares of the Lansdowne Jute Mills sold by him to the plaintiff and taking the delivery against payment of the 1000 shares of the Madan Theatres Ltd., sold by the plaintiff to the defendant.

8. On or about February 5, 1996, after pre-emptory demand by the plaintiff that the defendant should perform his obligations, the defendant took time till February 8, 1996, for the purpose, but even on that date the defendant failed and neglected either to give delivery of the shares sold by him or to take delivery of those purchased by him although the plaintiff was all along ready and willing to carry out his obligations.

9. On such default as aforesaid and after notice to the defendant, the plaintiff, on or about February 19, 1996, purchased 50 shares of the Lansdowne Jute Mills, at Rs._____ per share, and 100 shares of the Clive

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Limitation : Three years under Article 55 as this is a case of breach of contract.

Defence : In such cases defence usually is that the plaintiff was not ready and willing to deliver the goods or that the plaintiff was not ready and willing to deliver the same within stipulated time, when time was of the essence of the contract, or within a reasonable time, or that the goods offered were not according to sample or of the quality contracted for, or they were sent with other goods which were not

Mills Co. Ltd., at Rs._____ per share and the defendant thus became liable to pay the loss amounting to Rs._____ and Rs._____, respectively to the plaintiff.

10. The aforesaid sums of Rs____ and Rs____ also represent the difference between the contract price and market price of the shares of the Lansdowne Jute Mills and the Clive Mills when the defendant should have given delivery and the plaintiff alternatively claims these amounts as damages for breach of contract to sell the shares.

11. On February 18, 1996, after notice to the defendant, the plaintiff sold the 1000 shares of the Madan Theatres Ltd., on account of the defendant at Rs._____ per share. The defendant thus suffered a loss of Rs._____. Adding to this Rs._____ on account of interest on the amount of price due to the plaintiff and deducting the sum of Rs._____ on account of dividend credited in favour of the defendant, the defendant's liability to the plaintiff on account of the said shares comes to Rs.....

12. The aforesaid sum of Rs._____ also represents the difference between the contract price and the market price on 1000 shares of Madan Theatres Ltd., when the defendant should have taken delivery, and the plaintiff claims the amount alternatively as damages for breach of contract to purchase the shares.

13. On taking account of the sums mentioned in paras 5, 6, 9 and 11 above Rs._____ is due by the defendant to the plaintiff with Rs._____.on account of interest at the agreed rate of 9 per cent per annum from February 18, 1996, to the date of suit.

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ordered and there was difficulty in separating them or that they were ordered for a specified purpose and were not fit for that purpose. As to implied warranty, *see* section 15-17 and if the same has been broken, it affords a good defence, for example, if the good are not reasonably fit for the purpose they are required for (*Baretto* v. *Pruce*, A 1939 Nag 19).

If the goods were never intended to be delivered and only the difference due to market fluctuations was to be paid or received the plea that the contract was of a wagering nature and hit by section 30, Contract Act can be taken (*Chiman Lal* v. *Nyamat Rai*, A 1938 Bom 44; *Kong Yee* v. *Lowjee*, 29 Cal 461 PC, 28 IA 239; *Ebrahim* v. *Austin*, A 1946 PC 63).

It is no defence that on the due date the plaintiff was not actually in possession of the goods he had agreed to sell as the plaintiff can succeed even if he can show that he had control of the goods or the capacity to deliver them, if the defendant

The plaintiff claims Rs._____ with interest at 9 per cent per annum from the date of suit to that of payment.

No. 137—Suit for Damages for Non-Delivery of Goods Sold (rr)

1. By a contract in writing, dated April 16, 1995 the defendant sold and agreed to deliver 20 packages of long-cloth D1, each package containing 50 pieces, at Rs._____ per piece, to be delivered at the defendant's godown at Delhi on payment of the price in cash, on October 20, 1995.

The plaintiff tendered the price to the defendant at the defendant's godown, on October 20, 1995, but the defendant refused to deliver any of the said packages of long-cloth.

Particulars of Damage

Loss of profit at Rs.5 per piece on 20 packages containing 1,000 pieces Rs.5,000.

The plaintiff claims Rs.5,000 with interest from date of suit to that of payment.

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had called for delivery even by making purchase in the market. According to Nagpur High Court when a seller has no goods to deliver he suffers no damage which he can claim (*Vithulsa* v. *Raoji*, 151 IC 63, A 1934 Nag 129).

(rr) **The contract of sale and its breach must be specifically alleged in the plaint.** Unless the defendant has made a definite promise to deliver the goods, the plaintiff must allege that he demanded delivery (section 35, Sale of Goods Act). Ordinarily a plaintiff is not bound to allege or prove that he was ready and willing to perform his part of the contract unless the defendant expressly pleads and puts him to its proof (*Banarsilal* v. *Haji Abdulla*, 121 IC 723). The damages which can be claimed in such cases are the difference between the contract price and the market price at the date of the breach (*Jamal* v. *Moolla Dawood*, 43 Cal 493 PC; *Arjunsa* v. *Mohanlal*, A 1937 Nag 345; *Firm Bachraj* v. *Firm Khop Chand*, A 1949 Nag 199). If price had been paid, he can recover it with interest from the date of payment to that of judgment along with difference between the contract price and market price on the date of breach (*Rameshwar Das* v. *Refer Sales*, A 1944 Bom 21). In case of repudiation of contract damages cannot be claimed as on the date of repudiation but as on the date fixed for delivery (*Maung Pa* v. *Sa*, A 1933 Rang 25). It has been held in *Shri Ram* v. *Trimbak*, 103 IC 645, 29 BLR 1036, that in such a case the plaintiff cannot get a higher amount of damages than he is entitled to for breach of contract, by describing his claim as one for conversion in the alternative. Where property in goods had passed to buyer he may also sue for declaration and injunction to

No. 138—Ditto

(Form No. 14, Appendix A, C.P.C.)

1. On the____ day of_____19___, the plaintiff and defendant mutually agreed that the defendant should deliver [one hundred barrels of flour] to the plaintiff on the____day of_____19___, and that the plaintiff should pay therefore_____ rupees on delivery.

2. On the [said] day plaintiff was ready and willing, and offered to pay the defendant the said sum upon delivery of the goods.

3. The defendant has not delivered the goods, and the plaintiff has been deprived of the profits which would accrue to him from such delivery.

No. 139—Suit for not Delivering Goods According to Sample *(ss)*

1. By an agreement, dated June 27, 1995 the defendant sold and agreed to deliver to the plaintiff 60 pieces of Navy Blue serge, each piece being 20 metres, at Rs. 96 per metre, as per sample, on November 20, 1995.

2. The defendant delivered in pretended fulfilment of his contract, 60 pieces on, or about, November 25, 1995. The said 60 pieces did not correspond with the sample and were at once rejected by the plaintiff.

3. The plaintiff has suffered damage by the defendant's breach of contract.

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prevent the seller from reselling the goods (*Sadhusharan Singh* v. *W.B.S.E.B.*, (1986) 90 CWN 151).

Limitation. Three years under Article 55.

Defence : Denial of the contract or breach or of notice of special damages is the usual defence. But amount of damages may also be questioned or a plea may be raised that the defendant was ready to supply the goods but was prevented from performing the contract by an act of the plaintiff.

(ss) In such cases after accepting delivery, purchaser cannot reject the goods and sue for refund of price on the ground that the goods are not according to the contract but his remedy is a suit for damages (*Ishwar Das* v. *Kannu Mal*, 100 IC 548 Lah; *Nagadas* v. *Vel Mahomed*, 42 BLR 454; *Empire Engineering Co* v. *Municipal Board, Bareilly*, 119 IC 853, 1929 ALJ 674, A 1929 All 801 DB). The Calcutta High Court has held that he can also reject (*Lalchand* v. *Bajt Nath*, 63 Cal 737), but in a subsequent case (*Joseph Mary* v. *Phoni Bhushan*, ILR (1938) 2 Cal 88), where the plaintiff had kept the goods for too long he was held not to be entitled to reject

Particulars

Loss of profit at Rs. 20 per piece on 60 pieces—Rs. 1,200.

The plaintiff claims Rs. 1,200, with interest, from date of suit to that of payment.

No. 140—Suit for Damages for Non-Delivery Alleging Special Damage

1. By a contract in writing, dated May 15, 1984, the defendant sold and agreed to deliver to the plaintiff 500 qtls. of lime at Rs.60 per quintal, f.o.r. Dehradun, on or before June 15, 1984, and the plaintiff agreed to pay the price on delivery.

2. The plaintiff had entered into a contract with one Ram Bilas of Saharanpur to supply him with the said quantity of lime before July 1, 1984, at Rs.80 per quintal, and had purchased the lime from the defendant for the purpose of supplying it to the said Ram Bilas. The plaintiff had verbally told these facts to the defendant at the time of entering into the aforesaid contract with him.

3. The defendant failed to deliver any part of the said lime within the said time, or at all.

4. The plaintiff was unable to purchase similar goods in the market and to supply the same to the said Ram Bilas and lost the profit he would have made on the re-sale.

The plaintiff claims Rs.10,000, as damages, with interest, from date of suit to that of payment.

No. 141—Suit for Damages for Delivering Inferior Goods and not Delivering Part of the Goods

1. By a verbal agreement on November 4, 1994, the defendant agreed to supply to the plaintiff by December 4, 1994, 100 quintals of best Muzaffarnagar wheat, of the sample given by the defendant to the plaintiff the same day, at Rs.500 per quintal.

For principles governing failure to deliver goods according to the agreed time schedule see *Sind Biscuits Manufacturing Co* v. *Delight Engineering Works*, 1984 ALJ 964 DB. On section 73 Contract Act, see *Murlidhar* v. *Harish Chandra*, A 1962 SC 366.

2. The defendant delivered only 60 quintals of wheat and realised Rs.30,000 from the plaintiff, but the said wheat was not the best Muzaffarnagar wheat, and was inferior to the aforesaid sample. He did not deliver the remaining 40 qtls. within the aforesaid time, or at all.

Particulars of Damages

	Rs.
Difference between the market price of wheat contracted for and of the wheat delivered, at Rs. 50 per quintal, on 60 quintals	3,000
Difference between contract price and market price of contract wheat at Rs. 100 per quintal, on 40 quintals	4,000
Total ...	7,000

The plaintiff claims Rs.7,000 with interest from date of suit to that of payment.

No. 142—Suit in Respect of Articles Prepared to Defendant's Order *(tt)*

1. On December 14, 1995, the defendant verbally agreed with the plaintiff that the plaintiff should make for him a gold necklace of the following specification within one month, and that the defendant should pay Rs.25,000 for the said necklace on delivery thereof.

One necklace of 50 grams of 18 kt. gold, studded with 9 rubies weighing about 2 *ratti* each, and three diamonds each weighing about 1 1/2 *ratti*, of the pattern as given in the sketch on page 35 of the catalogue of Labh Chand Moti Chand, Jewellers of Calcutta, for the year 1995.

2. The plaintiff made the necklace and, on January, 10, 1996 offered to deliver it to the defendant and has ever since been ready and willing to do so.

(tt) The suit will be for damages unless the property has passed or price was agreed to be paid on a fixed day irrespective of delivery, in which case the suit can be for price of the article. A prayer for recovery of price on the plaintiff being made to deliver the article is one for specific performance of a contract, and as specific performance cannot be granted when compensation in money is an adequate relief it cannot be properly made.

3. The defendant has not accepted the said necklace or paid for it.

4. The plaintiff has in consequence suffered damage to the extent of Rs.4,000.

The said necklace, as manufactured to the defendant's order, has no sale in the market, and on being melted, it would yield gold worth Rs. 18,000 and the rubies and diamonds can be sold for Rs.3,000.

The plaintiff claims a decree for Rs.4,000, with interest from date of suit to that of payment.

No. 143—Ditto

(Form No.5, Appendix A, C.P.C.)

1. On the ___ day of _____ 19___, EF agreed with in the plaintiff that the plaintiff should make for him [*six tables and fifty chairs*], and that EF should pay for the goods on delivery _____ rupees.

2. The plaintiff made the goods, and on the ___ day of _____ 19___, offered to deliver them to EF and has ever since been ready and willing to do so.

3. EF has accepted the said goods or paid for them.

No. 144—Suit for Specific performance of a Contract to Sell Goods *(uu)*

1. On November 14, 1995 at Kanpur the plaintiff verbally agreed to purchase from the defendant, and the defendant agreed to sell and deliver to the plaintiff for the sum of Rs. 50,000 a certain old and rare book, being a manuscript copy of Firdausi's Shah Nama written in gold in the reign of Akbar.

2. The defendant failed to deliver the said book to the plaintiff within a reasonable time after November 14, 1995. On January 12, 1996 the plaintiff tendered the sum of Rs. 50,000 and demanded the said book

(uu) Specific performance of a contract to sell movables cannot ordinarily be claimed, as the presumption is that breach of such contract can be relieved by compensation in money (section 10 Expln., Specific Relief Act, 1963). But if the goods are of unusual beauty, rarity or distinction or of special value to the plaintiff by reason of personal or family association or the like, the general presumption is displaced and specific performance can be claimed. The plaint must, therefore, show the special value of the property. The other requirements of a suit for specific performance are the same as that of a suit about immovable property for which see note *(vv)*.

from him, yet the defendant refused to deliver the said book to the plaintiff and still retains and withholds the same from him.

The plaintiff claims:

1. Specific performance by the defendant of his contract to deliver the said book to the plaintiff and Rs. 10,000 as damages for the detention of the said book.

(2) In the alternative, Rs.20,000 as compensation for breach of the contract.

SALE OF LAND

No. 145—Suit by Vendee for Damage for Breach of Contract of Sale and for Specific Performance *(vv)*

1. By an agreement in writing, dated August 1, 1994 the defendant contracted to sell to the plaintiff the land specified at the foot of the plaint, within three months, for a consideration of Rs. 40,000 and the same day

(vv) Every lawyer must have a clear perspective of the provisions of sections 15 to 24 of the Specific Relief Act, 1963 before preparing the pleadings in a suit for specific performance of an agreement for sale. In case of breach of a contract by the defendant, the plaintiff may elect to put an end to the contract and sue for damages for such breach, or he may sue for specific performance and may claim compensation for the delays, or the two claims may be made in the alternative (*Calcutta Improvement Trust* v. *Subarnabala*, 44 CWN 541). When, however, a decree for specific performance is given, compensation is awarded only in exceptional cases when mere specific relief does not satisfy the justice of the case (*Venkataranga* v. *C.S. Ramaswamy*, 93 IC 670, A 1926 Mad 173, 22 LW 786 DB). Grounds of the additional claim of compensation, with particulars of the compensation claimed, should, therefore, always be given in the plaint. A prayer for possession may also be added, if necessary (*Chockalingam* v. *P.K.P.S. Pichappa*, A 1926 Mad 155, 92 IC 599 DB) see also, section 22, Specific Relief Act and *Krishna Kumar* v. *Balbir Singh*, 1984 ALJ 976; *Babulal* v. *Hazaribai*, A 1982 SC 818). The dismissal of a suit for specific performance will bar the plaintiff's right to sue for compensation for breach of contract. It is, therefore, necessary to include such a claim in addition to or in substitution of specific performance. (See sections 21 and 24 of the Specific Relief Act, 1963). The plaintiff may also include in the alternative a prayer for refund of earnest money or deposit paid (section 22). The failure to claim such a relief is however no bar to a separate suit therefor (section 24).

If it is enequitable to grant specific relief, the court would desist from granting a decree to the plaintiff (*A.C. Arulappan* v. *Smt. Ahalya Naik*, A 2001 SC 2783) As specific performance is a discretionary relief and the court may refuse it even in

the plaintiff paid to the defendant Rs. 4,000 as earnest money.

2. The said land is close to the plaintiff's ginning factory and the plaintiff required it for extension of his factory, the season for which commences on November 15. The plaintiff had told these facts to the defendant and the time fixed was, therefore, intended by the parties to be of the essence of the contract.

3. The plaintiff was and has always been ready and willing to perform

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second appeal (*Dayal Singh* v. *Mahabir*, A 1930 All 165). It is always better to add an alternative claim for damages in such cases, as otherwise section 24, Specific Relief Act will bar a subsequent suit for damages. A suit for specific performance has to conform to the requirements prescribed in Forms 47 and 48 of the Ist schedule to the Code of Civil Procedure. In every suit for specific performance or damages, **the plaintiff must allege the contract and its breach by the defendant and that he has performed his part of the contract, or is ready and willing to perform it. Omission of an averment of readiness and willingness to perform it may lead to dismissal of the suit** (*Madan* v. *Kamaldhari*, A 1930 Pat 121; *Tah Ah Boon* v. *Johare State*, 163 IC 417, A 1936 PC 236; *Abdul Khader Rowther* v. *P.K. Sara Bai*, A 1990 SC 682; *Krishnan Kesavan* v. *Kochukunju Karunakaran*, A 1988 Ker 107; *Dalmia Jain & Co.* v. *Kalyanpur Lime Works Ltd.*, A 1952 Pat 393; *Ramesh Chandra Chandisk* v. *Chunni Lal*, A 1971 SC 1238; *Useph Varghese* v. *Joseph*, (1969) 2 SCC 539; *Mohd. Shakoor* v. *Chhedi Keori*, 1995 (4) CCC 409 (All); *Oskar Louis* v. *K.V. Sardha*, A 1991 Ker 137). It is not necessary to prove that the plaintiff actually tendered the money (*Sabira Khatun* v. *Syeda Fatima Kahtoon*, A 1995 Gau 104; *Bhag Ram* v. *Pala Singh*, 1996 (1) SCJ 145 P&H).

A distinction may be drawn between "readiness to perform the contract" and willingness to perform the contract". By readiness may be meant the capacity of the plaintiff to perform the contract, this inlcudes his financial ability to pay the purchase money. But the more important question is whether he was willing to perform his part of the contract even if he had the financial capacity to do so. It is there that the plaintiff's conduct has to be properly scrutinised (*Basheskar Math* v. *Radha Krishna*, 1995 AIHC 2589 (P&H)). The provisions of section 16(c) are mandatory in nature. The plaintiff must allege and prove that he has been ready and willing to perform his part of the contract. On failure, the plaintiff is not entitled to decree (*Mohd. Shakoor* v. *Chhedi Koeri*, 1995 RD 28 (All)).

In a suit for specific performance of contract, the plaintiff must allege in the plaint his readiness and willingess to perform the part of his contract from the date of the contract till the date of the decree (*Mohanlal (deceased) his heirs* v. *Mirz. A.G. & another*, (1996) 1 SCC 639; *Jugraj Singh* v. *Labh Singh*, A 1995 SC 945; *Gomathinayagam* v. *Palanisami*, A 1967 SC 884).

The averment is, however, not necessary if the contract has been repudiated (*International Contractors* v. *Prasanna Kumar Sur*, A 1962 SC 77). It is not necessary to allege in the plaint all the steps taken by the plaintiff to show his

his part of the contract within the aforesaid time and, on November 14, 1984 tendered the balance of the consideration to the defendant but the defendant did not execute any instrument of transfer, whereby the plaintiff has lost the benefit of the purchase and has suffered damage.

[*If time was not the essence of the contract, substitute the following for paras 2 and 3*]

[2. The defendant was guilty of gross and unreasonable delay in

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readiness, as they will be only evidence of such readiness. It is thus not necessary to allege, for instance, that the plaintiff went to the Registration office with the purchase money, or that he purchased the stamp paper and got the sale-deed written out. If the plaintiff's readiness and willingness is disputed then all these facts may be proved by him at the trial and indeed every fact necessary to establish his readiness must be proved by him (*Abdudla* v. *Tenenhaum*, 1933 ALJ 1570 PC). Readiness and willingness implies not only the disposition but also the capacity to perform the plaintiff's part of the contract (*Bijai Bahadur* v. *Shiv Kumar*, A 1985 All 223). The readiness should be to perform the contract as it actually was and not as he alleges it was and the suit was dismissed when the plaintiff had alleged the price to be Rs. 85, and that he was willing to pay that price but the court found the price to be Rs.130 (*Rustomali* v. *Shaikh Ahides*, 45 CWN 837). But where the plaintiff after disputing the amount left to the court and expressed willingness to make such payment as may be fixed by the court, it was held to be sufficient averment of readiness (*Arjan* v. *Lakshmi Ammal*, A 1949 Mad 265, (1942) 2 MLJ 271, 1948 MWN 624).

In case of a breach of contract to purchase or sell immovable property, the time fixed for completion of the contract is not generally of the essence of the contract. But where it is, as when the property is of a fluctuating or diminishing character or when purchase was made for a particular object, the promisee may sue after the last day fixed for performance, and it is sufficient to allege his readiness to complete the contract on such day. It is not necessary to allege his readiness at any time after that day, or to make demand of performance. **But the fact that time was of the essence of the contract should be alleged** (*Ved Prakash* v. *Shishu Pal*, A 1984 All 288; *Govind Parsad* v. *Hari Dutt*, A 1977 SC 1005). If no time was fixed for the performance of the contract, or if time fixed was not of the essence of the contract, **the plaintiff must allege his readiness to perform his part of the contract within a reasonable time, and must allege a demand of performance within a reasonable time.** Ordinarily time is not of the essence of a contract of sale of land (*Jamshed* v. *Burjorji*, 14 ALJ 225, 23 CLJ 358, 20 CWN 744, 40 B 289, 30 MLJ 186, 18 BLR 163, 32 IC 246 PC; *Kalu* v. *Narayan*, 100 IC 578, 29 BLR 56; *Subedar Dubey* v. *Madho Dubey*, 1953 ALJ 121). Where in such cases, there has been improper delay in the performance, the other party has a right to fix a reasonable time within which the contract is to be performed and a distinct notice by him that he will consider the contract as cancelled if not completed within such time, is binding (*Compton* v.

performing his part of the contract after the aforesaid time and therefore notice in writing, dated December 1, 1994 was given by the plaintiff to the defendant personally (*or*, was sent by registered post) requiring the defendant to complete the said sale and receive the balance of the consideration from the plaintiff within a reasonable time, viz., on or before December 15, 1994.

3. The defendant has not completed the sale, whereby the plaintiff

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Bagley, 1 Ch D 313).

In the case of immovable property there is no presumption as to time being the essence of the contract. The mere fixation of a time period for the performance of the contract does not by itself make time essence of the contract. What is important is that the parties intended to make time essence of the contract. The language employed in the contract, should be capable of leading to the only conclusion, namely, the time fixed is the essence of the contract (*Chand Rani* v. *Kamal Rani*, A 1993 SC 1742; *E.S. Rajan* v. *R. Mohan*, 1995 AIHC 3218 (Kant.) (DB)).

The discretionary power under O. 7, R. 7 does not enable the court to override the statutory limitation contained in section 16 of the Specific Relief Act, 1963 and section 54 of the Limitation Act. 1963 which preclude the grant of the relief of specific performance of a contract except within the period prescribed by the section (*Thakamma Mathew* v. *A. Azamathula Khan*, A 1993 SC 1120). In a suit for specific performance of contract, decree cannot be refused merely on the ground that the description of the property in the agreement is not specific (*Debendranath Mohanty* v. *Annapurana Mohanty*, A 1996 Ori 89).

If, however, the defendant has definitely refused to perform the contract, or has shown such refusal by his conduct, e.g., by selling the property to another person, the plaintiff need not prove any performance of his part of the contract and need not allege any readiness to perform it (*Sreelal* v. *Hari Ram*, 88 IC 784, A 1926 Cal 181 DB).

It must be remembered that though the plaintiff may claim the same damages in the alternative as he could in a suit for damages for breach of contract, yet the measure of damages in awarding compensation to a plaintiff in case the court refuses specific performance is not necessarily the same as that in a suit for damages for breach of contract in which no specific performance is claimed. In the former, the amount of compensation is entirely in the court's discretion. The damages, or compensation, as they should be more properly called, claimed as an alternative in a suit for specific performance, are allowable only when the court refuses specific performance, and it has been held in Bombay that a plaintiff cannot abandon his prayer for specific performance and ask the court to allow him damages on the same measure as he could claim if he had not originally chosen to sue for specific performance of the contract, for when he is not himself prepared to have specific performance, he cannot have suffered any damage by the defendant's refusal. Even

has lost the benefit of the purchase and has suffered damage.

Or,

2. The plaintiff has, on November 14, 1994 and again on November 25, 1994 requested the defendant specifically to perform the said contract on his part, but the defendant refused and has failed to do so, whereby the plaintiff has suffered damage.

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if the court does not entirely dismiss the suit in such cases, it will take into consideration the plaintiff's abandonment of his claim in awarding him compensation. In *Ardeshar's* case, their Lordships of the Privy Council on appeal deprecated the action of the trial court in allowing the plaintiff to amend his plaint so as to make his claim one for damages *simpliciter*, but as, the suit was dismissed by their Lordships on another ground, they did not decide whether the plaintiff could change his claim from one for specific performance and compensation to one for simple damages, but observed that although the court has got wide powers to allow such an amendment, yet it should be exercised only in a proper case and under suitable conditions (*Ardeshar* v. *Flora Sasson*, 32 CWN 953, 30 BLR 1242, 55 MLJ 523, 55 IA 360, A 1928 PC 208; see also *Ram Saran* v. *Mahabir*, 25 ALJ 74 PC). The Allahabad High Court in a later case after considering the Privy Council ruling in *Ardeshar's* case held that in the circumstances of the case before it, the plaintiff should be allowed to withdraw the claim for specific performance and should be granted a decree for refund of the price paid by him with interest, as defendant had in no way suffered by the suit (*Jaggo Bai* v. *Harihar Prasad*, A 1940 All 41, 1939 ALJ 1107, 1939 AWR HC 821). In another case, where the contract of sale was made by one of several co-sharers of the property and the plaintiff abandoned the prayer of specific performance on the ground that other co-sharers refused to sell their shares, the Lahore High Court allowed the alternative claim for damages (*Mangal Singh* v. *Dial Chand*, A 1940 Lah 159, 188 IC 383). In another case when specific performance was rejected as government had acquired the land, permission to amend the plaint by praying for damages was refused in appeal on the ground that proceedings for acquisition were pending when plaintiff filed his suit yet he chose to sue only for specific performance (*Mohammad Abdul Jabbar* v. *Lalmia*, A 1947 Nag 254). **The plaintiff should, therefore, decide before instituting the suit whether it would be more profitable to take the property or to sue for damages only.**

The proper decree to be passed in a suit for specific performance of a contract of sale of land, when the same has subsequently been sold to a third party is to direct specific performance of the contract between the vendor and the plaintiff and direct subsequent transferee to join in the conveyance (*Durga Prasad* v. *Deep Chand*, A 1954 SC 75). Mere delay does not by itself preclude the plaintiff from obtaining specific performance nor could waiver or abandonment of rights be inferred merely from delay in the institution of the suit. Specific performance of a transaction

3. The plaintiff has been and is still ready and willing specifically to perform the agreement on his part of which the defendant had notice].

Particulars of Damage by Non-performance of Contract

Rs.

Difference between the contract price and the price when default took place ... ...

Interest on Rs. 4,000 paid, and Rs. 36,000 provided by the plaintiff for payment to the defendant at one per cent per mensem, from August 1, and November 14, ...

Total ...

Particulars of Damage for Delay in Performance

Rent paid by the plaintiff for similar land taken by him on lease, for_____ months, at _____ per mensem.

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which was for proper consideration when it was entered into could not be refused on the ground that at the time of the suit the value of the property had considerably risen. The validity of the transaction should, on principle, be judged as on the date of the transaction (*Sankaralinga Nadar* v. *Ratnaswami Nadar*, A 1952 Mad 399; *Madunsetty Satyanarayana* v. *Lalloji Rao*, A 1965 SC 1405; *S.V.R. Mudaliar* v. *Rajabu F. Buhari*, A 1995 SC 1607; *K.M. Madhavakrishnan* v. *S.R.Swami*, A 1995 Mad 318 (DB); *Godhan* v. *Ram Bilas*, A 1995 All. 257).

A contract entered into by the guardian of a minor cannot be specifically enforced against the minor, even though the guardian in part performance of the contract to sell has placed the vendee in actual possession (*Movva* v. *Mandava*, 110 IC 492, A 1928 Mad 830 DB; *Mir Sarwar Jain* v. *Fakhruddin*, 39 C 232, 9 ALJ 33, 39 IA 1, 13 IC 331, 14 BLR 5; *Manohardas* v. *Tarini*, 34 CWN 135, A 1929 Cal 612 DB; *Singara* v. *Ibrahim*, A 1947 Mad 94, 1947 MWN 463, (1947) 2 MLJ 103) nor can the minor be sued for damages for breach (*Krishna Chandra* v. *Seth Rishabha*, A 1939 Nag 265). A contract by manager of a joint Hindu family having a minor member can be enforced as against the minor, if it was a contract of sale for necessity (*Ramchandra* v. *Sundaramurthi*, 4 MLJ 9 (2); *Krishna Aiyar* v. *Shamanair*, 28 MLJ 610 (617), 17 IC 497; *Adinarayan* v. *Venkatasula*, A 1937 Mad 69; *Haricharan* v. *Kamla*, A 1917 Pat 478, 40 IC 42; *Mt. Dhopo* v. *Ram Chandra*, A 1934 All 1019, 154 IC 235; contra, *Nirpendra* v. *Ekharali*, 57 C 268, 34 CWN 272). But there is nothing illegal in a minor being transferee of property and a minor who has paid the consideration and obtained a transfer e.g., a mortgagee can enforce the transfer (*Zafar Ahsan* v. *Zubaida*, 27 ALJ 114). On the principle of mutuality in agreement

The plaintiff claims:

(1) That the court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in full possession of the said land.

(2) In case specific performance is decreed. Rs._____ compensation for withholding the performance.

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with minor's guardian, see *Raghavachariar* v. *Srinivas*, 40 Mad 308 (FB).

What contracts can and what cannot be specifically enforced, and by whom and against whom such performance can be claimed, is laid down in the Specific Relief Act (section 15-19). But a suit for damages for breach of a contract always lies, and the measure of damages is generally the difference between the contract price and the current market price. Where in a suit for specific performance of a contract to sell shares plaintiff had claimed damages in the alternative but afterwards abandoned the former and confined his case to the latter, it was held that the damages should be the difference between contract rate and rate on the date of filing the plaint and not the date on which the plaintiff abandoned his claim for specific performance (*United Brokers* v. *Alagappa*, A 1948 Mad 391, (1948) 1 MLJ 178, 1948 MWN 182).

Any costs incurred in making preparations for completing the contract, e.g., in investigating title, purchasing stamp-paper, or procuring money to be paid for consideration, unless procured prematurely, may also be claimed. Interest on deposit or earnest money can also be claimed as damages. Remote damages, such as for the loss of use to which the plaintiff might have applied the money cannot be claimed, unless the defendant had previous notice. The seller may retain the deposit money, if the buyer is in default (*Bishen Chand* v. *Radha Kishan*, 19 A 489; *Fazle Ahmed* v. *Rajendra*, A 1926 Cal 339, 93 IC 195 DB; *S.V. Vipper* v. *Sevat Ram*, 101 IC 686), but must give credit for it in the damages claimed for breach of contract (*Mangal Sen* v. *Mali Singh*, 164 IC 317, A 1936 All 566; *Gopaldas* v. *The Municipality, Hyderabad*, A 1940 Sind 1). But if the deposit is not intended to be in the nature of a security for the performance of the contract it cannot be forfeited (*Pasumarti* v. *Thammandra*, A 1926 Mad 117, 91 IC 765). It has been held by the Privy Council that earnest money is part of purchase money when the transaction falls through owing to vendee's fault (*Kanwar Chiannjit Singh* v. *Har Swarup*, 24 ALJ 248, 94 IC 782, A 1926 PC 1, 3 OWN 168, 1926 MWN 145, 50 MLJ 629; *Krishna Chandra* v. *Khan*, 161 IC 166, A 1936 Cal 51; *Sevanna* v. *Panna*, 99 IC 629; *Murlidhar* v. *International Film Co*., A 1943 PC 34). The fact that there is no forfeiture clause about earnest money in the agreement is immaterial, but the real intention of the parties is to be seen (*Nagar Mahapalika* v. *Sardar Karamjeet Singh*, 1967 ALJ 126).

Compensation should be fixed in the same way as damages under section 73, Contract Act (*Pratapchand* v. *Raghunath Rao*, 169 IC 887, A 1937 Nag 243). If any compensation is stipulated in the contract itself to be paid in case of breach, no sum

(3) In the alternative, Rs._____ as damages for non-performance of contract and repayment of Rs.4,000 paid as earnest money by the plaintiff.

(4) Interest from date of suit to that of payment.

No. 146—Suit for Specific Performance

(Form No. 47, Appendix A, C. P. C.)

1. By an agreement, dated the ___ day of _____19__, and signed by the defendant, he contracted to buy of [or, sell to] the plaintiff

in excess of it can be recovered, but the court can grant any compensation up to that limit, whether any actual damages have been incurred by the plaintiff or not (section 74, Contract Act) but the plaintiff cannot claim the amount of his actual loss (*Bhai Panna Singh* v. *Fore*, 27 ALJ 791). If the plaintiff has not suffered any damages but some injury not assessable in money, he can get *nominal* damages on showing the injury, and if damages are apprehended court can assess them and award them as prospective damages (*Ram Chandra* v. *Chinubhai*, A 1944 Bom 76). If a vendor has undertaken to discharge an encumbrance, a vendee plaintiff may pray in the suit for specific performance that the vendor should be ordered to dishcarge the encumbrance before he is allowed to take away the consideration money (*Kathamuthu* v. *Subramaniam*, 94 IC 561, A 1926 Mad 569, 50 MLJ 228, 1926 MWN 271).

Parties : In a suit for specific performance of contract, the vendor and on his death, his legal representatives are necessary party (*Manni Devi* v. *Ramayan Singh*, A 1985 Pat 35). A person not party to the agreement is neither a necessary nor a proper party (*A.K. Singh* v. *S. Misra*, 1995 RD 90 (SC)). A stranger to the contract who claims adversely to the vendor is not a proper party and cannot be ejected in such suit. He can be sued subsequently after success of the suit for specific performance (*Md. Hanif* v. *Marian*, A 1986 Bom 15).

A plaintiff in a suit for specific performance may implead a transferee of the property as a defendant, but the suit cannot be decreed against him, if he is a *bona fide* transferee for consideration without notice of the plaintiff's contract. It is for the defendant to prove this (*Shankar Lal* v. *Narayan Das*, A 1946 PC 97, 50 CWN 603; *Himmat* v. *Vasudeo*, 36 B 446; *Sankli* v. *Mahanaya*, A 1934 Pat 518; *Baburam* v. *Madhab Chandra*, 40 C 565; *Naubat Raj* v. *Dhonkal*, 38 A 184, 14 ALJ 111; *Imam Din* v. *Muhammad Din*, A 1926 Lah 136, 89 IC 422 DB; *Godhan* v. *Ram Bilas*, A 1995 All 357), and the plaintiff need not therefore allege notice in the plaint. In a suit for specific performance of contract, the subsequent vendee who is in possession of the property is a necessary party to the suit (*Narayana Pillai Chandrasekharan* v. *Kunju Amma Thankamma*, A 1990 Ker 177). It is necessary for the transferee to show that he had paid the consideration before he had notice of the previous contract (*Arunchala* v. *Madappa*, A 1936 Mad 949; *Jhandoo* v. *Ramesh Chandra*, A 1971 All 189). If a small portion of consideration was paid before notice and bulk

certain immovable property therein described and referred to, for the sum of _____ rupees.

2. The plaintiff has applied to the defendant specifically to perform the agreement on his part, but the defendant has not done so.

3. The plaintiff has been, and still is ready and willing specifically to perform the agreement on his part of which the defendant had notice.

The plaintiff claims that the court will order the defendant specifically to perform the agreement and to do all acts necessary to put the plaintiff in

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after notice of the previous contract, the transferee cannot be said to be *bona fide* (*Gauri Shankar* v. *Ran Sewak*, A 1934 All 1045, 1934 ALJ 871, 152 IC 39). If his transfer is incomplete, e.g., his sale-deed is unregistered, suit will be decreed against him even if he took, without notice as he is not a 'transferee' (*Loknath* v. *Wahab*, A 1930 Pat 81).

If a plaintiff obtains a decree against the vendor alone, he cannot, after his right of specific performance is barred by limitation, sue a subsequent purchaser with notice for possession after the vendor has executed a sale-deed in his favour (*Gauri Shankar* v. *Ibrahim*, 116 IC 70, A 1929 Nag 298). But a suit cannot be decreed against a subsequent transferee who has a right of pre-emption against the plaintiff (*Dayal Singh* v. *Mahabir*, A 1930 All 166). The interest of a person in whose favour a contract to sell land is made is assignable and the assignee can, therefore, claim specific performance (*Munuswami* v. *Sagalaguna*, 100 IC 399, A 1926 Mad 699, 51 MLJ 229 DB; *T.M. Balakrishna Mudaliar* v. *M. Satyanarayana Rao*, A 1993 SC 2449), but the relief may be refused if the act of the assignee could be regarded akin to champertous (*S.V.R. Mudaliar* v. *Rajabu F. Buhari*, A 1995 SC 1607). One of the co-contractors can sue for specific performance, impleading the other as *pro forma* defendant (*Jagdeo Singh* v. *Bishwambhar*, 171 IC 654, A 1937 Nag 186). A subsequent purchaser's possession is not wrongful, until the plaintiff obtains a sale-deed in his favour in execution of a decree for specific performance, even if he had purchased with notice of the previous contract in plaintiff's favour. He is not, therefore, liable for mesne profits (*Narsingappa* v. *Tuppanna*, 164 IC 152, A 1936 Bom 276). A person claiming adversely to the vendor is not a necessary party where property stands in the name of a person other than the vendor but he may be joined as a proper party on the allegation that he is *benamidar* for the vendor. If such person denies this, the matter cannot be adjudged in this suit but he must be discharged and if plaintiff obtains a decree against the vendor he can institute a suit against such person after having a conveyance executed in his favour, in execution of the decree (*Prem Sundar* v. *Habibulla*, A 1945 Cal 355; *Mt Nagi* v. *Damodar*, A 1948 Nag 181).

Court-fee – A suit for specific performance of a contract of sale should be valued, both for purposes of jurisdiction as well as court-fee, at the amount of the consideration.

full possession of the said property (*or*, to accept a transfer and possession of the said property) and to pay the costs of the suit.

No. 147—Ditto

(Form No. 48, Appendix A, C.P.C.)

1. On the ___ day of _____ 19__, the plaintiff and defendant entered into an agreement in writing, and the original document is hereto annexed.

The defendant was absolutely entitled to the immovable property described in the agreement.

2. On the ___ day of _____ 19__, the plaintiff tendered _____ rupees to the defendant and demanded a transfer of the said property by a sufficient instrument.

3. On the ___ day of _____ 19__, the plaintiff again demanded such transfer [*or*, the defendant refused to transfer the same to the plaintiff].

4. The defendant has not executed any instrument of transfer.

5. The plaintiff is still ready and willing to pay the purchase money of the said property to the defendant.

Limitation : Three years from the date fixed for performance, or if no such date is fixed, from the date when plaintiff has notice that performance is refused by the defendant (Article 113 of 1963 Act). In the absence of either of these dates, limitation of three years runs from the date when the plaintiff can demand specific performance, or when the defendant is in a position specifically to perform his contract (*Venkanna* v. *Venkata*, 41 M 18; *Chando Den* v. *Suraj Kumari*, 1996 All LR 336 All).

Defence : Defendant may plead that he was ready and willing to perform his part of the agreement and the plaintiff himself committed default and is not, therefore, entitled to damages or specific performance, or he may plead, in a suit for specific performance, that the plaintiff has already got compensation for the breach, or that the contract had, by mutual agreement been rescinded. The defendant may show that the plaintiff has no title to the property, he agreed to sell. If the seller is a Hindu father having minor sons of whose existence defendant did not know, the defendant can plead that the title agreed to be conveyed by the father was imperfect (*Ratan Singh* v. *Nanik Ram*, 109 IC 183, A 1927 Sind 219; *Valabh Das* v. *Nagardas*, A 1921 Bom 334 DB). When a manager of joint family agreed to sell without necessity and other members were not made parties and the plaintiff refused to purchase manager's share for the whole consideration then suit was dismissed (*Gulam Nabi* v. *Kishin Chand*, A 1949 Sind 18). Any other plea which can be urged against the specific

The plaintiff claims :

(1) That the defendant transfer the said property to the plaintiff by a sufficient instrument (*following the terms of the agreement*).

(2) _____ rupees compensation for withholding the same.

No. 148—Suit by a Vendor for Specific Performance of a Contract to Purchase Land or for Damages

1. By an agreement in writing, dated October 16, 1995, the defendant agreed to purchase the plaintiff's house No.128 in Shanti Vihar, Nagpur from the plaintiff for Rs.2,00,000. The defendant paid Rs. 5,000 as earnest money to the plaintiff and, by the said agreement agreed that the sale should be completed, and the balance of the purchase money paid on December 16, 1995.

2. On the said October 16, 1995, the plaintiff had told the defendant that he was required to pay Rs.2,00,000 under a pre-emption decree on December 16, 1995 and the said December 16, 1995, was fixed by the parties with reference to this obligation of the plaintiff, and time was of the essence of the contract.

3. The plaintiff was ready and willing, on the date fixed, to execute a proper deed of sale on receiving the balance of the purchase money, and had called upon the defendant to perform his part of the contract and to pay the balance of the purchase money on the date fixed, but the defendant did not do so (*or*, the defendant, on December 14, 1995 refused to purchase the property and to pay the balance of the purchase money).

[*Or, if time was not of the essence of the contract—*

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performance under the Specific Relief Act may be urged in a suit for specific performance.

It is no defence that the agreement provides damages in case of breach (*V.K. Kandasami* v. *Shammughr*, A 1949 Mad 302; *Metta Rama* v. *Metta Annayya*, A 1926 Mad 144, 49 MLJ 117, 90 IC 551; contra *Monfar* v. *Dewan Rawsan*, A 1943 Cal 586), but where in such a case the plaintiff had on hearing of the vendor's intention to sell the property to another person, given notice to such person that he would claim damage, specific performance against such person was refused (*Daya Ram* v. *Karmumal*, A 1937 Sind 263). Inadequacy of price is no defence (*Bani Madho* v. *Ramnath*, A 1941 Oudh 324, 194 IC 533), nor any other hardship to the defendant (*Ram Sundar* v. *Kali Narayan*, 104 IC 527 Cal; *G W. Davis* v. *Maung Shwe*, 38 IA 155). If a subsequent purchaser with notice has also been impleaded he may claim

2. The plaintiff, on December 14, 1995 and again on December 16, 1995, told the defendant that he was willing and ready to execute a deed of sale, and called upon the defendant to perform his part of the contract and to pay the balance of the purchase money, but the defendant did not do so (*or*, refused to perform his part of the contract on December 14, 1995].

3. The plaintiff is still ready and willing to perform his part of the contract.

4. By reason of the default of the defendant the plaintiff has suffered damage.

Particulars of Damage

Difference between the contract and market price Rs.....

Interest on Rs._____ which the plaintiff borrowed from the Allahabad Bank to pay up the pre-emption decree, at 15 per cent per annum Rs.....

The plaintiff claims:

(1) That the court will order the defendant to pay Rs._____ to the

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any sum he may have spent in discharging a prior encumbrance on the property (*Nasir Uddin* v. *Ahmad Husain*, 97 IC 543, A 1926 PC 109, 1926 MWN 812).

If the suit is otherwise valid, it is no defence that plaintiff had other remedies which he has allowed to become time-barred (*Sohanlal* v. *Atalnath*, 1934 ALJ 1584, A 1933 All 846). The execution of the sale-deed in pursuance of the agreement would be no defence if the sale-deed required registration but was not registered and was taken out of the vendee's control, so that the vendee could not have it compulsorily registered (*Mohammad Akram* v. *Mula Singh*, 89 IC 414 DB).

A suit for specific performance is not barred even if the plaintiff could bring a suit for compulsory registration of a sale-deed which had been executed by the defendant (*Amir Chandra* v. *Nathu*, 7 ALJ 887, 7 IC 408; *Surendra Nath* v. *Gopal Chandra*, 12 CLJ 464, 8 IC 794; *Nasir Uddin* v. *Sidhu*, 27 CLJ 538, 44 IC 361). But the Madras High Court has taken a different view and has held that if the plaintiff has failed to avail himself of the remedy of a suit under section 77, Registration Act, he cannot bring a suit for specific performance (*K. Satyanarayana* v. *Y. Chinna*, 100 IC 365, A 1926 Mad 530, 50 MLJ 674, 49 M 302, 23 LW 277 DB). Long delay in institution of suit and gross negligence of plaintiff may be pleaded (*Shiam Bahadur* v. *Madan Singh*, A 1945 All 293; *Khushi Ram* v. *Munshi Ram*, A 1940 Lah 225, 189 IC 418). Mere delay, however, is no defence unless it is shown that the claimant knew

plaintiff and to accept a sale-deed from the plaintiff on the terms mentioned in the said agreement.

(2) Rs.____ damages for withholding performance of the contract.

(3) In the alternative to the first and second reliefs, Rs._____. as damages.

(4) Interest from date of suit to that of payment.

No. 149—Suit against a Vendor for Refund of Purchase Money on Ground of Latter's Defect of Title *(www)*

1. On June 3, 1987, the defendant executed a sale deed in favour of the plaintiff in respect of the house therein described and referred to for a consideration of Rs.39,000, which the plaintiff paid in cash, and put the plaintiff in possession.

2. One Mt. Shirin Begum, a sister of the defendant instituted a suit against the plaintiff (being suit No. 323 of 1988) in the court of the Civil Judge at Monghyr for recovery of a one-third share in the said property on the allegations that the house had belonged to her father and that she inherited a one-third share in it.

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that the other party is altering his position on the belief that the claimant has abandoned his claim and even then the claimant does nothing (*Mohd. Wazir* v. *Jahangirmal*, A 1949 Lah 72), or it can be inferred that plaintiff had abandoned his right or it can be shown that on account of the delay there has been such change of circumstances that grant of specific performance would prejudice the defendant (*Arjuna* v. *Lakshmi Ammal*, A 1949 Mad 265, (1948) 2 MLJ 271, 1948 MWN 624; see also, *K. Sambasiva Rao* v. *Bangaru Raju*, A 1985 AP 393). A subsequent purchaser may plead that he was a *bona fide* purchaser for value without notice of the earlier agreement (*Rameshwar* v. *Hari Narayan*, A 1984 Pat 277). Purchaser of a property *pendente lite* cannot claim to be a *bona fide* transferee for value (*Kaulashwari Devi* v. *Nawal Kishore*, 1995 Supp. (1) SCC 141). Defence of frustration of contract (section 56, Contract Act) may be taken if transfer has, after the contract, been absolutely prohibited by law (*Mugneeram Bangur & Co.* v. *Gurbachan Singh*, A 1965 SC 1523), but not where it is permissible with sanction of the authorities and the vendor fails to apply for sanction (*Nanak Chand* v. *Chandra Kishore*, A 1970 SC 446; *Boothalinga Agencies* v. *T.C.P. Nadar*, A 1969 SC 110).

(www) In all such cases the question of limitation is always a serious question and should be carefully studied before the plaint is drafted. Such claim may be for damages for breach of an express or implied contract for good title and quiet enjoyment, or for money had and received by the vendor for the use and benefit of the vendee.

3. The plaintiff defended the said suit but it was decreed on January 4, 1993 and in execution of the said decree, the plaintiff was deprived of possession of a one-third share in the said property on March 8, 1995.

The plaintiff, therefore, prays for a decree for Rs.13,000, being the proportionate consideration of the sale-deed of the defendant in respect of the one-third share lost by the plaintiff.

No. 150—Suit for Refund of Price by Vendee Deprived of Possession owing to Vendor's Fraud

1. On April 4, 1994 the defendant executed a sale deed in favour of the plaintiff in respect of a shop therein described, for a consideration of Rs.80,000 which the plaintiff paid in cash, and put the plaintiff in possession.

The suit can always be filed as one for damages for breach of contract, the limitation for which is 3 years (Article 55). In the case of an implied contract for good title, which is always read into every conveyance by virtue of section 55 (2) Transfer of Property Act, limitation runs from the date of sale (*Ganapa* v. *Hammad*, 49 B 596). But if the vendee obtains possession under the sale-deed, the limitation runs from the date of his dispossession (*Secretary of State* v. *Venkayya*, 40 M 910; *Muhammad Sadiq* v. *Muhammad Nuth*, 124 IC 185 All). In the case of an express contract, for instance, when there is a clause in the sale-deed that the vendor would refund the price in case of the vendee's dispossession by one having superior title, limitation would run from dispossession as that would amount to a breach of the contract (*Ram Dularey* v. *Hardwari Lal*, 40 A 605).

If the sale is void *ab initio* for example, when the vendor has no title whatsoever or where both parties were under a mistake that the vendor has title as in *Rani Kanwar* v. *Mahboob*, 1930 ALJ 327, A 1930 All 252, and the vendee does not obtain possession, the suit for refund of price will be governed by Article 62 (now 24) and limitation will run from the date of sale (*Ardesir* v. *Vajesing*, 25 B 593; *Ratan Bai* v. *Ghasiram*, 134 IC 1157, 33 BLR 1094, 55 B 565). The Allahabad High Court in such a case applied Article 97 (now 47) (*Hans Ram* v. *Chotey*, 171 IC 923. A 1937 All 689), and when the plaintiff's claim for possession was decreed by lower court and was dismissed in appeal, held that time began to run from the date of Appellate Court judgment (*Munalal* v. *Nanhi*, 103 IC 385). In a suit framed as one for damages Madras High Court applied Article 116 (now 55) and held limitation to run from the date of dismissal of plaintiff's suit for possession (*Thillaikannu* v. *Abdur Kadir*, 140 IC 805, 1933 MWN 649, 64 MLJ 336, A 1933 Mad 126), and the Rangoon High Court also applied Article 116 (now 55) but held the date of sale to be the starting point of limitation (*P.L.A.V. N.K. Chettyar Firm* v. *Adinmanlagi*, 167 IC 809, A 1937 Rang 39).

If the sale is voidable and the vendee has not obtained possession Article 97 (now 47) would apply and limitation would run from the date when the vendee is

2. One Ram Lal obtained a decree for possession of the said property against the plaintiff (being decree No. 100 of 1986) from this court on the basis of a sale-deed executed in his favour by the defendant on April 1, 1984 and in execution of the said decree obtained possession of the said property on October 25, 1995.

3. The plaintiff had, at the time of his purchase, no knowledge of the sale-deed in favour of Ram Lal.

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obstructed in obtaining possession (*Hanuman* v. *Hanuman*, 19 Cal 129; *Tulsiram* v. *Murlidhar*, 26 B 750). There is no fresh start of limitation by any subsequent efforts of the vendee to obtain possession through court and therefore if the vendee brings his suit for possession and the suit is dismissed he does not get a fresh limitation from the dismissal of the suit.

If, however, in either case, i.e., whether the sale is void or voidable, the vendee obtains possession and is subsequently dispossessed he can sue for refund of his money within three years provided by Article 97 (now 47) from the date of his dispossession (*Abdul Rahim* v. *Kadu*, 118 IC 203 Sind) or, if the dispossession is made through court, from the date of the adverse order against him. The Patna High Court has applied Article 116 (now 55) to such cases (*Devi Prasad* v. *Haji Syed*, A 1940 Pat 81, 18 Pat 654). If dispossession has been made through court, actual dispossession in execution of the adverse order will not give a fresh start of limitation, nor will an appeal from such adverse decision (*Sigamani* v. *Munibadra*, A 1926 Mad 255; *Juscurn* v. *Prithi Chundra*, 46 C 670, 17 ALJ 514).

If a suit for damages for breach of contract is barred but a suit for refund of price under old Article 97 (now 47) is not, there is no objection to the plaint being drafted as one under Article 97 (now 47) or the plaintiff may even claim damages or refund of price alternatively under Article 116 or 97 (now 55 or 47). When the sale-deed was registered, the longer period of six years provided by old Article 116 could be availed of (*Abdul Rahim* v. *Kadu*, 118 IC 203; *Mt. Lakhpat Kr.* v. *Durga Prasad*, 117 IC 654, A 1929 Pat 432; *Babu Ram* v. *Amba Prasad*, A 1946 All 159), but now under Article 55 the distinction between registered and unregistered contract has been done away with.

In case of breach of contract the plaintiff can recover damages and not only refund of price. According to the Bombay and Allahabad High Courts, therefore, the purchaser can recover the value of the property on the date of his eviction even if it exceeds the price paid by him (*Nagar Das* v. *Ahmad Khan*, 21 B 175; *Ram Sing* v. *Sajan*, 101 IC 704, A 1927 Sind 120; *Muhammad Sadiq* v. *Muhammad Nuh*, 124 IC 185). The Nagpur Court has, however, held that in such a case a vendee can recover only the value on the date of his purchase (*Zingaraji* v. *Nagasa*, 99 IC 313). This latter view is based on a narrow interpretation of section 73, Contract Act, which, it is submitted, is not justified.

If the vendor has committed a fraud, for example by previously, selling the property to another, the vendee is entitled to avoid the sale and claim refund of the

The plaintiff claims :

(1) Refund of Rs.80,000.

(2) Rs.2,000 on account of interest thereon from October 25, 1995 to date of suit at 1 per cent per mensem by way of damages.

(3) Interest from date of suit to that of payment.

No. 151—Suit for Refund of Price of Auction Purchase when Judgement Debtor had no Saleable Interest *(xx)*

1. The plaintiff obtained a decree No.213 of 1981 against one Chatrapat Singh from the Court of the Civil Judge at Hazaribagh and, in execution thereof certain properties detailed in Schedule 'A' attached to the plaint were sold in different lots and were purchased by the plaintiff on November 19, 1982 for total sum of Rs.1,40,500 which the plaintiff paid in cash into the court.

2. Sheoraj deceased, father of the defendant, had also obtained a money decree against the said Chatrapat Singh (being decree No. 403 of 1981) and had applied for rateable distribution of the sale-proceeds realised on execution of the plaintiff's decree, and under an order of the court, obtained Rs.28,000 out of the money in deposit, on February 15, 1983.

3. Smt. Meena Kumari, wife of the said Chatrapat Singh, brought a suit in the court of the Civil Judge at Hazaribagh for declaration of her title to a portion of the said property, viz, to the property detailed in Schedule 'B' attached to the plaint, and made Chatrapat Singh also a defendant and her suit was decreed on appeal to the High Court on December 11, 1991 and therefore the said Chatrapat Singh was held to have no saleable interest in the said property and the said Smt. Meena Kumari took possession of the said property on September 29, 1977.

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price inspite of a clause in the sale-deed that the vendor would not be liable for any defect in his title (*Akhtar Jahan* v. *Hazari Lal*, 103 IC 310 All).

If the contract of sale is void as being in contravention of any Act of Legislature a refund of the price cannot be claimed (*Sada* v. *Hayat*, 109 IC 633 Lah).

(xx) Such a suit by an auction purchaser, against the decree-holder does not lie according to the Allahabad and Calcutta High Courts (*Ram Sarup* v. *Dalpat*, 58 IC 105, 43 A 60, 18 ALJ 905; *Amar Nath* v. *Firm Chotey Lal Daya Prasad*, 1938 ALJ 95 FB; *Risheecase* v. *Manik*, 96 IC 64, 53 C 758, 43 CLJ 418, A 1926 Cal 971 DB). A full bench of the Oudh Chief Court (one Judge dissenting) has, however, held that

4. The said property mentioned in Schedule 'B' had been sold for Rs.1,32,950 and the rateable sale-proceeds which the defendant's father Sheoraj received out of this amount of Rs.1,32,950, was Rs.26,500.

5. The said Sheoraj died in 1993, and the defendant is his son and only heir.

The plaintiff claims a decree for Rs.26,500 with Rs. _____ on account of interest at ___ per cent per annum from the date of plaintiff's dispossession to the date of suit, with future interest up to date of payment, against the assets of Sheoraj in the hands of the defendant.

No. 152—Suit for Unpaid Purchase Money, by Enforcement of Charge *(yy)*

1. By a sale-deed of June 14, 1991 executed by the plaintiff and registered on June 26, 1991, the plaintiff sold the property specified at the foot of the plaint to the defendant for a consideration of Rs.10,000 and put the defendant in possession.

2. Out of the consideration the defendant paid Rs.6,000 at the time of registration of the sale-deed, and verbally agreed to pay Rs.4,000 within four months (*or*, and by a bond executed by him on June 14, 1991, agreed to pay the remaining Rs.4,000 in four monthly instalments of Rs.1,000 each on July 14, August 14, September 14, and October 14, 1991).

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such suit would lie (*Bahadur Singh* v. *Rampal*, 124 IC 641, 7 OWN 232, A 1930 Oudh 148). The same view has been taken by the East Punjab High Court (*Amolok Chand* v. *Md. Shafi*, A 1948 East Punjab 1); and also by a Full Bench of the Madras High Court (*Nacha* v. *Kattara*, A 1936 Mad 50, 159 IC 625) and Rajasthan High Court (*Thakural* v. *Nathulal*, A 1964 Raj 140); but when the defect was not in the entire property, but the judgment-debtor was found to have no title in a part of the property, no suit lies according to the Madras High Court (*Firm Narasingi* v. *Suryaderara*, A 1945 Mad 363). Such a suit must be brought within three years provided by Article 113 (previously six years under Article 120) from the date of decree or order declaring that judgment-debtor had no saleable interest, the date of plaintiff's dispossession being immaterial (*Amolok Chand* v. *Md. Shafi*, A 1948 East Punjab 1).

(yy) A vendor can sue for recovery of the purchase money remaining unpaid, even if the same is recited in the sale deed as having been paid (*Meghraj* v. *Abdulla*, 12 ALJ 1304, 25 IC 208). The fact of such recital need not be alleged in the plaint, though the plaintiff will certainly have to give convincing explanation of it in his evidence. A suit for recovery of price has been held to be one for specific

3. The defendant has not paid Rs.4,000 or any part thereof.

4. The plaintiff claims payment of Rs.4,000 with interest from the date of suit to that of payment or in default sale of the property specified at the foot of the plaint.

No. 153—Suit for Breach of Agreement to Purchase Land

(Form No. 13 Appendix A, C.P.C.)

1. On the ___day of _____19__, the plaintiff and defendant entered into an agreement, and the original document is hereto annexed.

[*Or*, On the ___day of _____19__, the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty *bighas* of land in the village _____of _____ for _____ rupees.]

2. On the ___day of _____19__, the plaintiff being then the absolute owner of the property (and the same being free from all

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performance of a contract so that if the sale-deed is unregistered, it can be admitted in evidence in the suit under the proviso to section 49, Registration Act (*N.A.S.S. Subramanian* v. *S.N.A.M. Arunachalam*, A 1943 Mad 761).

Section 55, clause 4 (b) of Transfer of Property Act, creates a charge on the property sold and a suit may be brought either for a simple money decree or for enforcement of the charge. Even if simple money bond is passed for the balance of the price, the charge is not extinguished (*Webb* v. *Macpherson*, 31 C 67). The charge cannot be enforced against a *bona fide* transferee without notice (*Guru Dayal* v. *Haran Singh*, 33 A 554). If the plaintiff is entitled to interest, e.g., if it is agreed to be paid or if the money is payable under a written contract, or if the plaintiff is entitled to it as damages, the interest will also probably be a charge on the property (see, *Gangaram* v. *Nathu Singh*, 5 L 425 PC).

If part of the purchase money has been left with the vendee for payment to vendor's creditor, and the amount is not paid, the vendor can recover the amount and can enforce the charge (*Meghraj* v. *Abdulla*, 25 IC 208, 12 ALJ 1024; *Subramania* v. *Subramania*, 39 M 99; *Reghunath* v. *Sadagopa*, 12 IC 353, 10 MLT 300), even though he had not discharged the debt (*Ram Prasad* v. *Huchhe*, 7 Mys LJ 233; *Sheopati* v. *Jagdeo*, 1930 ALJ 1141; *Mt. Naima Khatoon* v. *Basant Singh*, A 1934 All 406 FB) or suffered in any other way from non-payment (*Pyarelal* v. *Mt. Kalawati*, A 1949 All 348, 1948 OWN 421; but see *Mahadeo* v. *Mahipal*, 12 ALJ 921, 25 IC 939). A Full Bench of the Allahabad High Court has taken the view in *L. Shanti Sarup* v. *Janak Singh*, 1957 ALJ 875, that the vendor has in such cases two other remedies also. He can, before he actually suffers damage, bring an action to have himself put in a position to meet the liability which the purchaser had

encumbrances, as was made to appear to the defendant), tendered to the defendant a sufficient instrument of transfer of the same (*or*, was ready and willing, and is still ready and willing and offered to transfer the same to the defendant by a sufficient instrument) on the payment by the defendant of the sum agreed upon.

3. The defendant has not paid the money.

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undertaken to, but had failed to, discharge. He can also file a suit on the contract of indemnity and recover the loss he has suffered as a consequence of the failure of the vendor to discharge the liability. Under the Limitation Act of 1963, the Article applicable to both the cases would be Article 55.

It has been held in *Makund Lal* v. *Bholanath*, 131 IC 686, 1931 ALJ 985, A 1931 All 419, that the fact that interest on the debt is mounting up is sufficient to show that plaintiff is damnified. A creditor can also sue for such sum on the ground that the vendee was trustee for him (*Sriranganma* v. *Seethamma*, 6 Mys LJ 576). But it has been held by a Full Bench in Madras that the creditor cannot sue the transferee, except where a trust, express or implied, has been created in his favour, or where there has been a novation of obligation undertaken by the transferee (*Trimulu Subbo* v. *Arunchalam*, 58 MLJ 420, A 1930 Mad 382, 124 IC 55). The same view has been taken in Lahore (*Maghimal* v. *Darhara*, 143 IC 755, A 1933 Lah 695). If the creditor sues the vendor and realises the money from him, the vendor gets a new cause of action to sue the vendee on the ground of implied indemnity (see precedent No. 52). If purchaser sues for possession, a decree can be given to him conditionally on his paying the money to the vendor (*Pearylal* v. *Hub Lal*, A 1945 All 139).

Limitation : For such a suit is three years for simple money decree and 12 years for a suit for enforcement of the charge, from the date fixed for payment. If no such date is fixed, and money is left for payment to a creditor, limitation runs either from the date of sale-deed or within a reasonable period thereafter (*Kallu* v. *Ram Das*, 26 ALJ 53), or the date when the vendee repudiates his liability or the date when by the payment of the debt by the vendor himself the performance of the contract is rendered impossible (*Ram Rachhya* v. *Raghunath*, 5 Pat 860). If the suit was for damages it was held in some cases that it was governed by old Article 115 or 116 (now 55) and limitation ran from the date when the vendor is damnified (*Gulzari Mal* v. *Maghi Mal*, 141 IC 435, A 1933 Lah 109; *Narainami* v. *Vendaniveka*, 56 M 724, 1933 MWN 370, A 1933 Mad 424, 144 IC 558; *Bhanji* v. *Govind*, A 1933 Nag 379; *Chand Bibi* v. *Santosh*, 60 C 761, A 1933 Cal 641, 146 IC 863; *Gouri Lal* v. *Ram Lal*, A 1941 Pat 11; *Mt. Dulbin Sio Sakhi Koer* v. *Ram Avtar Singh*, A 1950 Pat 21, and in some cases by Article 83 (*L. Shanti Sarup* v. *Janak Singh*, 1957 ALJ 875).

USE AND OCCUPATION *(zz)*

No. 154—Suit for Damages for Use and Occupation

1. The defendant occupied the house described below on January 4, 1995 with the permission of the plaintiff and remained in possession upto July 4, 1995 it being verbally agreed that the amount of rent would be settled later on.

(Description of the house)

* * * *

2. No rent was in fact settled. The use and occupation of the house was reasonably worth Rs.125 a month.

The plaintiff claims Rs.750 for use and occupation for six months, with interest from the date of suit to that of payment.

No. 155—Ditto, Statutory Form

(Form No. 9, Appendix A, C.P.C.)

1. That the defendant occupied [the house No..... Street] by permission of the said XY, from the __ day of _____19__, until the __ day of _____ 19__, and no agreement was made as to payment for the use of the said premises.

(zz) This form is necessitated when the defendant's possession of the plaintiff's property is not wrongful (in which case, a suit for mesne profits would be maintainable), nor that of a tenant (in which case, a suit for rent would lie), nor that of a licensee without consideration (in which case, no suit would lie). Damages for use and occupation can be claimed when the defendant has been in possession of the property of the plaintiff without any express agreement to pay rent, but with the permission of the plaintiff. In such a case the law presumes an intention to pay a fair and reasonable rent. The Calcutta High Court has held that such a suit can be brought even against a trespasser, for the owner may disregard the trespass and treat the trespasser as tenant (*Sammiulla* v. *Nil Mamud*, 97 IC 564 Cal). It is always better to make an alternative claim for mesne profits, as the defendant may deny occupation by permission. If, in a suit for arrears of rent and ejectment, the plaintiff is unable to prove the term of the tenancy, he may amend his plaint and get a decree for damages for use and occupation. This often happens when the terms of tenancy are incorporated in a document which is not admissible in evidence e.g., in unregistered *kirayanamah*, or where not reduced to writing though under the law a lease was necessary (*Raghubar* v. *Sheo Baksh*, 110 IC 875, A 1928 Oudh 479 DB; see also *Sheo Karan Singh* v. *Maharaja Prabhu Narain Singh*, 31 All 276 FB. In this case decree for use and occupation was given in a suit for rent without an

2. That the use of the said premises for the said period was reasonably worth _____ rupees.

3. The defendant has not paid the money.

The plaintiff, as executor of XY, claims (*relief claimed*).

No. 156—Alternative Suit for Damages for Use and Occupation or Mesne Profits

1. The plaintiff is the owner of the house described below :

(Description of the house)

* * * *

2. The defendant occupied the said house on January 4, 1995, with the permission of the plaintiff and remained in possession upto July 4, 1995. No agreement was made for payment of rent.

3. Alternatively, the defendant took possession of the said house and occupied it wrongfully.

4. The letting value of the said house is Rs.125 per mensem.

The plaintiff claims:

(1) Rs.750 with interest from date of suit to that of payment as money due for use and occupation for six months.

(2) Alternatively, the like sum as mesne profits for the defendant's wrongful possession of the said house.

No. 157—Alternative Suit for Rent or for Damages for Use and Occupation

1. The plaintiff let the house described below to the defendant on January 4, 1995, by written agreement of that date at a rent of

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amendment). In such cases, an alternative claim for use and occupation may be safer. If the defendant's possession was permissive, the plaintiff's title need not be alleged, as the defendant cannot deny it (section 116, Evidence Act). In a pure suit for use and occupation, therefore, plaintiff's title need not be alleged but, **if an alternative claim for mesne profits is added, the plaintiff's title must clearly be alleged.** No notice of demand is necessary before suit (*Bhai Jai Kishen v. People's Bank*, A 1944 Lah 136).

Limitation : Three years under Article 55 as there is an implied contract in such cases to pay for use of the land. If the suit is against a co-sharer taking joint land into his exclusive use, Article 113 (three years) will apply as there is neither contract nor tort.

Rs.120 per mensem. Alternatively, the use and occupation of the said house was reasonably worth Rs.120 a month.

(Description of the house)

* * * *

2. The defendant remained in possession of the said house from January 4, 1995 to July 4, 1995.

The plaintiff claims :

(1) Rs.720 with interest from date of suit to that of payment, as rent for six months.

(2) Alternatively, the like sum as money due for use and occupation for the said period.

WORK *(aaa)*

No. 158—Claim for Work Done under a Contract

1. By a contract in writing, dated July 4, 1995 the plaintiff agreed to paint all the doors, windows and railings of the defendant's house at No. 33, Cotton Street, Calcutta, and the defendant agreed to pay for it on completion of the work at the rates given below:

Rates ... ...

2. The plaintiff has completed the aforesaid work on November 14, 1995 and a sum of Rs.5,200 is due to him at the aforesaid rates. The defendant has not paid the same or any part thereof.

The plaintiff claims Rs.5,200 with interest from the date of suit to that of payment.

Defence : The defendant may plead that he has been in possession adversely to the plaintiff, or that the damages claimed are excessive or that there was a contract to pay a lesser amount as rent.

(aaa) Suit for work done lies when work is done by the plaintiff for the defendant under a contract, express or implied. But when work is done by the plaintiff on his own material in making an article to be delivered to the defendant under a contract of sale e.g., preparing a pair of boots for the defendant, the work is done by the plaintiff for himself and not for the defendant and the suit should be brought for price of goods or for damages for not purchasing of goods ordered, and not for work done. A volunteer, who does work on the property of another in such a way that the other has no option but to accept the work, in not entitled to any compensation, e.g., a trespasser making repairs in the defendant's house.

No. 159—Suit for Failure to do Work according to Contract

1. The plaintiff was a contractor for the construction of the building of the New Normal School at Muzaffarnagar. The defendant is a sub-contractor.

2. By the contract in writing, dated October 14, 1994 the defendant agreed to do all the painting work for the plaintiff in the said building with the best material, and to fix glass panes on all the doors and windows of the said building, and to finish the said work by March 25, 1995.

3. The plaintiff had to deliver the completed building to the Education Department on April 1, 1995 and had given notice of this fact to the defendant. Time was, therefore, the essence of the contract with the defendant.

4. The defendant did not do all the painting work of the said building with the best materials nor did he fix all the glass panes by March 25, 1995.

Particulars

(i) The defendant did not paint the doors of the superintendent's quarters, the boarding-house, kitchen and the latrines.

(ii) The defendant painted all the other doors and railings with poor quality paint *beroja* and linseed oil.

(iii) The defendant did not fix any glass panes in the doors of the almirahs of the boarding house.

(iv) The defendant fixed the other panes so negligently that they fell down on account of the blowing of the wind.

5. The plaintiff has suffered the following damages:

A suit for work done can be brought after the whole work has been completed, unless there was a contract for payment for part of the work (section 39, Contract Act). If material was also used by the plaintiff for the defendant he can add a claim for its cost. He can also sue for loss of profit (*A.T. Brij Paul Singh & Bros* v. *State of Gujarat*, A 1984 SC 1703).

In a suit for breach of contract for doing work or for doing the work negligently and not according to the agreement, **the term of the agreement which has been broken by the defendant must be alleged and the breach should be alleged in the words of the agreement, particulars of the breach and damages being added.**

Rs.

Employment of extra labour at a specially heavy cost to do the work left undone by the defendant and to remove all the paint applied by the defendant and to have the doors and railings re-painted with good quality paint (22 labourers for five days at Rs.____ per man per day) ... ...

Cost of 100 glass panes for doors of the boarding house almirahs and of 200 panes substituted for the broken panes

Cost of good quality paint ... ...

Total ... ____

Deduction of the balance which was due to the defendant from the plaintiff under the agreement ... ...

Total ... ____

The plaintiff claims Rs._____, with interest from the date of suit to that of payment.

No. 160—Suit against a builder for defective Workmanship

(Form No. 17, Appendix A, C.P.C.)

1. On the ___day of_____ 19__, the plaintiff and defendant entered into an agreement, and the original document is hereto annexed, *(Or, state the tenor of the contract)*

[2. The plaintiff duly performed all the conditions of the said agreement on his part].

When special damages over and above those which ordinarily arise from the breach, are claimed for breach of a contract **it should be alleged in the plaint that notice was given to the defendant at the time of the contract that such damages would be claimed.**

Limitation : Three years under Article 18.

Defence : In a suit for price of work done the defendant may plead any defects in the work, or that it was not according to the contract, or that it was not done under defendant's order, or may claim a set off for any damages for delay in

3. The defendant [built the house referred to in the said agreement in a bad and unworkmanlike manner].

No. 161—Suit for Special Damages for Breach of Contract to do work within time

1. The plaintiff hires out motor cars for the journey from Jammu to Srinagar and back. The season for such journey is from May 1 to the end of October.

2. On February 12, 1995 the plaintiff took his car to the defendants, who are car repairers, to have it overhauled and put into perfect running order. The plaintiff, at that time, told the defendants that he required the car to be in prefect running order by April 25, in order to carry passengers from Jammu to Srinagar. He further told the defendants that if the car was not in perfect running order by that date he could lose a profit of Rs.1,000 a week.

3. The defendant verbally agreed to put the car into running order for a sum of Rs.14,200 and to deliver the same on April 25, 1995.

4. In breach of the said contract, the defendant failed to deliver the said car by April 25 and did not in fact deliver the same until June 6, 1995. The plaintiff has consequently suffered damage. He has lost the use of the car from April 25 to June 5 and has thus suffered a loss of profit of Rs.5000.

The plaintiff claims Rs.5,000 as damages with interest from the date of suit to that of payment.

No. 162—Suit for Services at a Reasonable Rate

(Form No. 7, Appendix A, C.P.C.)

1. Between the ___day of _____19__, and the ___day of _____19__; at _____, the plaintiff [*executed sundry drawings, designs and diagrams*] for the defendant at his request; but no express agreement was made as to the sum to be paid for such services.

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completing the work. He may plead that defendant used inferior material or that the payment was subject to a certificate by an engineer and the same has not been obtained. In a claim for bad work, the defendant may plead that the work was done according to the agreement, or that the damages claimed are too remote.

He may plead that he had no notice that any special damage to that plaintiff would result from the breach.

2. The services were reasonably worth _____ rupees.

3. The defendant has not paid the money.

No. 163—Suit for Service and Materials at a Reasonable Cost

(Form No. 8, Appendix A, C.P.C.)

1. On the ___day of _____19__, at , the plaintiff built house [known as No. _____, in _____], and furnished the materials therefor, for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials.

2. The work done and materials supplied were reasonably worth _____ rupees.

3. The defendant has not paid the money.

No. 164—Suit for Work done at a Reasonable Cost *(bbb)*

1. Between February 1, 1996 and April 25 1996 at Meerut, the plaintiff stitched a number of clothes and furnished all materials except the upper cloth, at the request of the defendant, but no express agreement was made as to the rate at which the plaintiff was to be paid for his services and the materials.

2. The cost of the materials furnished by the plaintiff and the plaintiff's stitching charges at reasonable rates come to Rs.2,225 as per details given at the foot of the plaint.

3. The defendant has paid Rs.245 and has not paid the rest of the sum due or any part thereof.

The plaintiff claims Rs.1,980 with interest from the date of suit to that of payment.

(bbb) This form of action becomes necessary when work is done without any express agreement about wages, but with no intention of doing it gratuitously. (*see* section 70, Contract Act).

II—PLAINTS IN SUITS FOR TORTS*

ANIMALS

No. 165—Suit for Damages for the bite of Defendant's Dog *(a)*

1. The defendant kept at his house in Mohalla Nai Basti, Agra, a dog which, on January 1, 1995 attacked and bit the plaintiff and caused him personal injuries. The plaintiff has, in consequence, suffered damage.

2. The said dog was of a fierce and mischievous nature, and accustomed to attack and bite mankind, and the defendant kept the said dog well knowing that it was of such fierce and mischievous nature and so accustomed.

Particulars of the Injuries Caused

The plaintiff was bitten in the right leg, there upon he fell down on the pavement and received hurt in his left arm and the head. He was, when lying, again bitten by the dog in his right arm.

Particulars of the Special Damages Claimed

	Rs.
Travelling expenses to and from Kasauli for self and two attendants	2,000
Expenses of treatment and residence at Kasauli at Rs. 200 per day, for 15 days	3,000
Loss of business as a broker for one month that the plaintiff remained in hospital	3,000

*In suits for damages for tort, generally speaking, the particular tortious act must be specifically alleged. It is necessary for the plaintiff to bring himself within the four corners of some recognised head of law and there is no right of action for damages at large nor can judges invent new heads of injury. The law of tort is administered in India as rule of justice, equity and good conscience and though English law need not be applied in all its details when that is found to be unsuitable to local conditions, yet English law is recognised as the basis (*Baboo* v. *Mt. Subashni*, A 1942 Nag 99). Institution of civil proceedings maliciously and without a reasonable or probable cause is not a tort and no action would lie for damages (*Bhupendra* v. *Trinayani*, A 1944 Cal 289). If general damages are claimed no allegation about them is necessary but particulars of any special damages claimed must be given

DEFENCE

It has been fully explained in Chap. XV of the first part how a written statement should be drafted by the defendant. There are some pleas which are of general character e.g., pleas of denial, limitation, jurisdiction, etc. What other particular and special pleas can be raised in particular suits has been indicated in the foot-notes to the precedents of plaints in such suits. It should not, therefore, be a difficult task for a defendant to frame his pleas in the written statement. It has not, therefore, been considered necessary to give precedents of written statement in all the suits for which forms of plaints have been given. But model written statements have been drawn up for more important suits and these written statements have been drafted with reference to the precedents of plaints given in this book. The number of the plaint to which a particular written statement relates has been given at the top of the written statement, and it would be profitable to read the plaint and the written statement together.

Before these model written statements will be found forms of certain pleas of general character which can be taken in most kinds of suits. They will show how such pleas which are common to many suits should be drafted.

GENERAL DEFENCES

No. 1—Accord and Satisfaction *(a)*

(By Work Done)

From January 20,1996 to January 29, 1996 the defendant did certain work for the plaintiff in repairing his furniture and making certain new furniture, which work was done by the defendant and accepted by the plaintiff in satisfaction and discharge of the plaintiff's claim under the said bond in suit.

(By giving a bond)

1. The defendant, on May 4, 1995, executed a bond in favour of the plaintiff in lieu of the price of grain due from the defendant to the plaintiff for which the plaintiff has brought this suit.

(a) The plea of mere accord is no defence and should not be raised without the plea of satisfaction.

2. The said bond was executed and delivered by the defendant and received and accepted by the plaintiff in discharge of the plaintiff's claim for the said price of grain.

(*By delivery of Cattle*)

1. On November 15, 1995, it was agreed between the parties that the defendant should deliver to the plaintiff, and the plaintiff should accept, 2 cows and 2 bullocks belonging to the defendant, in full satisfaction and discharge of the plaintiff's claim under the bond in suit.

2. On November 16, 1996, the defendant in pursuance of the said agreement, delivered to the plaintiff, and the plaintiff accepted, the said cows and bullocks in full discharge of the said bond.

(*Or*, 1. On November 15, 1995, it was agreed between the plaintiff and the defendant that the defendant should deliver to the plaintiff and the plaintiff should accept, the defendant's horse, in full satisfaction and discharge of the plaintiff's claim for damages for the horse shot by the defendant.

2. On November 20, 1995, the defendant, in pursuance of the said agreement, delivered to the plaintiff, and the plaintiff accepted, the said horse in full discharge of his said claim).

No. 2—Acquiescence

See Chapter XV ante, for ingredients of this plea.

No. 3—Condition Precedent *(b)*

(*Condition in the agreement*)

1. By the agreement of October 20, 1993, referred to in the plaint, it was a condition precedent to liability of the defendant for payment of the work done by the plaintiff that the plaintiff should get the said work checked by the District Engineer, Saharanpur, and certified by him as having been properly done.

2. The plaintiff did not get the said work checked or certified as aforesaid.

(b) Vide O.6, R. 6, the defendant must specifically plead any condition precedent, the performance or occurrence of which he intends to contest. If the defendant does not plead it, the objection will be considered to have been waived.

(*Condition of statutory notice*)

1. Under section 54 of Cess Act (Bengal Act IX of 1880) a notice by the plaintiff to the defendant is condition precedent to the liability on the part of the defendant to pay cess.

2. The said condition was not performed in that no such notice was given by the plaintiff to the defendant before the suit.

(*The like, in a brief form*)

The plaintiff did not prefer his claim in writing to the defendant Railway Administration in the manner, and during the period, prescribed by section 106 of the Indian Railways Act, (section 78-B of the old Act) and the suit is not, therefore, maintainable.

(*See also under "notice", post*)

No. 4—Custom or usage *(c)*

(*Communal custom*)

Amongst the (*name the caste or sub-caste*) of the Meerut division there is a certain and reasonable custom which is immemorial and has been followed without interruption, that a widow can take a married boy in adoption as son.

(*Local custom*)

There is in *mohalla* Abupura, in the town of Muzaffarnagar, a local custom of pre-emption, particulars of which are given below and the said custom is certain, reasonable and immemorial and has been followed without interruption.

The plaintiff is not bound to plead the performance or occurrence of it in his plaint, therefore, the defendant cannot take an objection in point of law on the basis of the plaintiff's omission to plead the same. If the condition is statutory, e.g., of a previous notice required by law as in the case of a suit against railway administration, the condition need not be stated at length, but a reference to the law may be made and it may be alleged that the condition required by it has not been performed.

(c) Custom should be alleged specifically with all material details. It is not sufficient to plead that the defendant is entitled to such and such thing under village custom or that the plaintiff has no right to the property under the local custom of the village. The custom should be alleged in a separate paragraph, with such terms as are material to the defence. If the custom is so well established as to

Particulars : The custom is about pre-emption of houses and its incidence are the same as of the law of pre-emption under the Mohammedan Law with this exception that under the custom *talabs* or demands are not necessary in any particular form but simply one demand is necessary to be made in any form.

(Usage of trade)

There is a custom in the Shamli grain market that on all *khatti* transaction interest is charged at fifteen per cent per annum on all money due to the principal from a commission agent or *vice versa*, and this custom, which is certain, reasonable and immemorial, has been followed without interruption.

No. 5—Denial *(d)*

(Denial of execution)

The defendant denies that he borrowed Rs.200 or any other sum from the plaintiff, or that he executed the bond in suit.

(Denial of custom)

The defendant denies that there is any custom amongst the (*caste or sub-caste*) of the Meerut division under which a widow may take a married boy in adoption as son.

(Denial of consideration)

The defendant admits that he executed the bond in suit, but denies that he received the consideration alleged in para 1 of the plaint, or any consideration, for the said bond.

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have become a well-known law, it need not be alleged with full particulars. As the essential requisites of a valid and binding custom are that it should be certain, reasonable and immemorial and should have been followed without interruption, those qualities should also be alleged. If the particulars and details of the custom are small, these requisites may be alleged along with them, but if they are considerable, they may be briefly referred to with the allegation of custom and particulars should be given separately below.

(d) The words used in the plaint should normally be used when denying a fact. But where the statement of facts in the plaint is very lengthy there is no objection to the defendant alluding to the facts by their substance and denying them but the facts denied must be clearly and unmistakably referred to in the plea.

(*Denial of tenancy*)

The defendant denies that he entered into possession of the house in suit under the lease alleged in para 1 of the plaint or under any other lease.

(*Denial of lengthy allegations of facts*)

The defendant denies that he spoke or published the words alleged in para 1 of the plaint.

(*Or*, 1. The defendant denies that he made any of the several representations alleged in paras 2, 3 and 4 of the plaint.

2. The defendant denies that the plaintiff was induced to execute the said sale-deed by any of the said alleged representations).

(*Denial of due execution and attestation*)

Defendant denies that the alleged deed of gift was duly executed or attested.

Particulars : The signatures of the executant were obtained on blank paper on which the deed appears to have been engrossed subsequently. The attesting witnesses neither saw the executant sign the deed nor did they attest it on the executant's acknowledgment.

[*Forms given in Appendix A, C.P.C.*]

The defendant denies the (*set out facts*).

The defendants does not admit that (*set out facts*).

The defendant admits that but says that

The defendant denies that he is a partner in the defendant firm of

No. 6—Estoppel *(e)*

(*Estoppel by document*)

The plaintiff is estopped from saying that he was not the owner of the property in suit on December 20, 1995 because the plaintiff represented by his recitals in the sale-deed executed on the aforesaid date in favour of the defendant that he was the owner of the said property, and thereby induced the defendant to purchase it from the plaintiff.

(e) Full facts constituting the estoppel must be given. Plea of promissory estoppel can also be raised against government and public bodies (*Gappu Lal*

(*Estoppel by representation*)

The plaintiff is estopped from denying the defendant's vendor Smt. Ram Piari had an absolute interest in the property, by reason of the fact that the plaintiff had himself represented to him on December 20, 1995, that the said Smt. Ram Piari had an absolute interest in the property, and had thereby induced the defendant to purchase it from the said Smt. Ram Piari.

(*Estoppel by conduct*)

The plaintiff is estopped from asserting that the property belongs to him because the said property was, in the knowledge of the plaintiff, put up to auction sale in execution of decree No. 900 of 1986 passed by the Munsif of Rangpur, against one Karim Baksh, and the plaintiff and the defendant both attended the said auction sale on June 10, 1986, and bid for the property, and the defendant purchased the property, as the highest bidder, and the plaintiff never made any claim to the said property but by his said conduct induced the defendant to believe that the plaintiff had no claim to the said property.

(*Estoppel by omission*)

The plaintiff is estopped from asserting the mortgage in suit by the reason of the fact that he had put to sale the property in suit in execution of his money decree No.200 of 1980, passed by the Subordinate Judge of Delhi, without giving the purchasers a notice of the mortgage now sought to be enforced and thus induced the defendant to believe that the

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Muni Lal v. *State of U.P.*, 1971 ALJ 796; *Century Spinning & Manufacturing Co.* v. *Ulhasnagar Municipal Council*, A 1971 SC 1021; *Gujarat State Finance Corporation* v. *Lotus Hotel*, A 1983 SC 848). The doctrine of promissory estoppel cannot be invoked to compel the public bodies or the Government to carry out the representation or promise which is contrary to law or which is outside their authority or power (*Shabi Construction Company* v. *City and Industrial Development Corporation*, (1995) 11 MLJ (SC) 62).

For invoking the principle of promissory estoppel, the promisee must have altered his position on the basis of the promise (*Dr. Ravi Srivastava* v. *Vikram University*, 1995 (3) SLJ 18 (SC); see also *State & H.P* v. *Ganesh Wood Products*, (1995) 6 SCC 363, A 1996 SC 149). The principle of promissory estoppel is not a pure question of law. A person invoking benefit of promissory estoppel must provide precise data in support of his plea and specify the various ingredients of the rule

property was being sold free from plaintiff's encumbrance, if any, and to purchase the property under the said belief.

[*Form given in Appendix A, C.P.C.*]

The plaintiff is estopped from denying the truth of (*insert statement as to which estoppel is claimed*) because (*here state the facts relied on as creating the estoppel*).

See also in Chapter XV, page 311 ante.

No. 7—Fraud *(f)*

The defendant was induced to make the alleged contract by fraud of the plaintiff.

Particulars of the fraud : In order to induce the defendant to agree to purchase the property, the plaintiff, on June 10, 1995, verbally represented to the defendant, falsely and fraudulently, that the net annual profits of the property were Rs.4,000, whereas, as the plaintiff well knew, the fact was that the net profits of the said property were only Rs.2,250.

No. 8—Illegality *(g)*

The alleged agreement was without consideration and is therefore void.

The alleged contract was against public policy.

The consideration of the alleged contract was immoral.

No. 9—Insolvency *(h)*
(*Plaintiff's insolvency*)

The plaintiff has been adjudged insolvent by order of the District

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laid down in Motilal Padampat's case [(1979), 2 SCC 409] (*International Limited* v. *Assistant Director, General of Foreign Trade*, (1996) 2 SCC 439).

(f) Fraud may be pleaded as an answer to the enforcement of any contract. But full particulars of the fraud alleged must be given.No case of fraud can be gone into by courts unless it is pleaded with the utmost particularity and unless it is found as laid (*Mate Nande* v. *Dalchand*, A 1948 Nag 170).

(g) Facts showing the illegality of the contract must be given. It is not sufficient to allege that the contract was illegal or void. **A plea of mere denial for the contract would not include a plea of its illegality.**

(h) The result of adjudication of insolvency is described in Sec. 28 of Act V of 1920. All property of the insolvent vests in the receiver and the latter, not the former, should therefore bring any suit concerning the same. No creditor of the

Judge of Bhagalpur, dated May 15, 1994, and the cause of action sued on herein vested in the Receiver of his property.

(*Defendant's insolvency*)

1. The defendant has been adjudged insolvent by order of the District Judge of Trichnopoly, dated November 16, 1995.

2. The debt in suit is one which was provable under the Provincial Insolvency Act.

3. The plaintiff has not obtained the leave of the court as required by section 28, Act V of 1920, and cannot, therefore, bring this suit.

[*Form given in Appendix A, C.P.C.*]

The defendant has been adjudged an insolvent.

The plaintiff before the institution of the suit was adjudged an inslovent and the right to sue vested in the Receiver.

No. 10—Jurisdiction *(i)*

(*Territorial*)

Defendant denies that he resides within the jurisdiction of this court. He resides at Karnal, and this court, therefore, has no jurisdiction.

(*Or*, The defendant denies that the bond was executed at Meerut. It was executed at Delhi, and this court has, therefore, no jurisdiction to try the case).

(*Or*, The defendant denies that money payable under the said contract was made payable at Meerut, and submits that this court has no jurisdiction to try the case).

(*Pecuniary*)

The defendant denies that the value of the subject matter of the suit is

insolvent can sue the insolvent in respect of any debt provable under the Act, except with the leave of the court obtained before the suit (*Dwarka* v. *Tej Bhan*, 40 B 235).

The prohibition does not extend to debts not provable under the Act. For what debts are provable, *see* section 34. But proceedings commenced before adjudication can be continued without leave of the court against the insolvent. Mere filing of a petition of insolvency does not debar any remedy against the insolvent. The bar continues up to the date of discharge.

(i) *Vide* Chap. XV Page 307

Rs.20,000. It is Rs.900, and the suit is not cognizable by this court.

(Regular and Small Cause Courts)

The suit is cognizable by the Small Cause Court and this court has no jurisdiction to try it.

(*Or*, The alleged act of the defendant amounts to a criminal offence, hence the cognizance of this suit by Small Cause Court is barred by Article 35 (ii) of the first schedule to the Provincial Small Cause Act).

(Civil and Revenue)

The suit is one cognizable by a Revenue Court under section _____ of Act _____ of _____, and its cognizance by a Civil Court is barred by section _____ of that Act.

[*Form given in Appendix A, C.P.C.*]

The court has no jurisdiction to hear the suit on the ground (*set forth the grounds*).

No. 11—Limitation *(j)*

The plaintiff has not been in possession at any time within 12 years before this suit, and the suit is barred by Article 64, Limitation Act, 1963.

(*Or*, The defendant obtained physical possession of the house purchased by him on June 13, 1964, hence his suit, filed on June 15, 1972, is barred by Article 97, Limitation Act, 1963).

(*Or*, The defendant does not admit that the plaintiff attained majority on June 10, 1970, and submits that he attained majority in 1968 and the suit is, therefore, barred by section 8 of the Limitation Act, 1963).

(*Or*, The defendant denies that he made the payment alleged in para 4 of the plaint).

(*Or*, The defendant admits that he paid Rs.500 as alleged in para 4 of the plaint, but denies that he did so on account of the debt in suit).

(*Or*, The defendant admits having made the payment alleged in para 4 of the plaint, but denies having put his thumb mark under the endorsement of payment).

(j) When the plaintiff claims that the suit falls within any exception to the general rule, it is enough to deny the facts bringing the suit within that exception,

(Or, The defendant did not make the acknowledgment alleged in para 4 of the plaint).

(*Or*, The defendant admits having made the statement alleged in para 4 of the plaint, but contends that it does not amount to an acknowledgment which could, under the law, extend the period of limitation).

(*Form given in Appendix A, C.P.C.*)

The suit is barred by Article ____ or Article _____ of the Limitation Act, 1963.

No. 12—Minority *(k)*

The defendant was born on ___, and was, on the date of the alleged agreement, a minor.

(*Or*, The plaintiff is and on the date of the institution of this suit was, below the age of 18 and, therefore, a minor, and he cannot bring this suit without a next friend).

(*Or*, 1. The defendant was born on

2. By an order, dated ____, the District Judge of Poona appointed one Ram Prasad as guardian of the person of the defendant.

3. The defendant, therefore, was on the date of the alleged execution of the bond in suit, a minor).

(*Or*, The defendant was born on ____, and is a minor and cannot be sued without a guardian *ad litem*).

(*Form given in Appendix A, C.P.C.*)

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and it is not necessary expressly to plead that the suit is barred by limitation.

(k) Minority may be pleaded as a complete defence to a suit on the basis of an agreement, as all contracts made by a minor are void. The minor is not estopped from pleading his minority as a defence by his having himself represented to the plaintiff at the time of contract that he was major (*Radha Kisen* v. *Bhorey*, 26 ALJ 83, 110 IC 837, A 1928 All 626; *Gulabchand* v. *Chunnilal*, A 1929 Nag 156, 25 NLR 85; *Khangul* v. *Lakha*, 111 IC 175, A 1928 Lah 609; *Gadigeppa* v. *Balangowda*, 55 B 741, A 1931 Bom 561, 33 BLR 1313. *See* note under "Suits for cancellation"). The minority on the date of the alleged agreement must be alleged specifically. The present minority of the plaintiff may be pleaded as bar to the institution of the suit without a next friend. If the defendant is a minor and is sued as major, he must make an application through some guardian pleading that he is a minor, and the court will

The defendant was a minor at the time of making the alleged contract.

No. 13—Misjoinder

The suit is bad for misjoinder of causes of action.

(*Or*, The suit is bad for misjoinder of defendants and causes of action).

(*Or*, The suit is bad for misjoinder of plaintiff and causes of auction).

(See also Chapter XI page 192)

No. 14—Non-joinder

_____ being a subsequent mortgagee (*or*, a son of the mortgagor and having an interest in the mortgaged property) is a necessary party.

(*Or*, _____ is also a joint co-sharer in the land in dispute and the plaintiffs cannot sue alone).

(*Or*, The suit is bad for non-joinder of _____ who is a necessary party).

(Also see Chapter XII Page 207)

No. 15—Mistake *(l)*

The agreement to sell the horse as alleged in para 1 of the plaint was entered into under a mutual mistake about a fact essential to the agreement.

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then have a preliminary hearing on that question and determine whether he is minor or major. But the minority of a co-defendant is no defence and should not therfore be pleaded. For example, if there are two defendants A and B to a suit for possession, and B is a minor and is absent. A cannot plead that the suit is barred as B is sued as a major. That is no concern of A and the defect in the suit does not exonerate him from his liability. If B wants to plead it, he can.

But while minority is a defence to a suit on a contract, it is no defence to a suit based on tort, e.g., to a suit for assault, false imprisonment, trespass, libel, etc. But when intention, knowledge, malice or some other condition of the mind forms an essential ingredient of the wrong (as in the case of fraud), extreme youth by reason of which the defendant was incapable of contriving the fraud, etc., will afford a defence. An action which arises from a contract cannot be changed into one for tort in order to make the minor defendant liable, e.g., in a suit on a bond given by a minor, the plaintiff, cannot succeed by alleging that the defendant had made fraudulent representation about his age (*Dhanmull* v. *Ramchander*, 24 C 265).

(l) A mistake in order to render an agreement void must be a mutual mistake of both the parties and it must be about a matter of fact essential to the agreement (section 20, Contract Act). These facts should be alleged. If the mistake is not

Particulars of the mistake : The horse which the defendant agreed to sell and the plaintiff agreed to buy, had, before the date of the said agreement, been dead, and neither the plaintiff nor the defendant was aware of this fact at the time of making the agreement.

No. 16—Notice *(m)*

(Defence by a Public Officer)

The plaintiff did not deliver to the defendant any notice as required by section 80, C.P.C. before the institution of this suit, and the suit is, therefore, not maintainable.

(Defence by Central Government Representing Railway)

The defendant does not admit the allegation in para 6 of the plaint that a notice was delivered as required by section 80, C.P.C. The notice as alleged in para 6 was sent to the Divisional Commercial Superintendent of the Northern Railway and not to the General Manager thereof.

(*Or*, The plaint contains no statement of any notice having been delivered to one of the officers mentioned in section 80, C.P.C. and is therefore bad).

(*See also under "condition precedent" ante page 849*).

No. 17—Insufficiency of Notice

The notice under section 80, C.P.C. upon the Collector was not sufficient in law inasmuch as it did not specify the relief which the plaintiff has claimed, (*or*, inasmuch as the cause of action stated therein was an

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mutual, but the defendant alone was under a mistake, he cannot avoid the contract, unless he can show that the mistake was caused by the plaintiff, in which case it would become a misrepresentation. Nor will a mistake about law be any defence unless there was a mistake of fact about which it was made.

(m) There are some suits which cannot be instituted without a previous notice. The notice may be one provided by the agreement between the parties or by law. It is a "condition precedent" and is not pleaded by the plaintiff, but defendant must plead its absence if he wants to contest the suit on the ground of want of notice.

But when law which requires, it also lays down that the fact of the giving of the notice should be mentioned in the plaint, the plaintiff must allege it. If he does

alleged negligence, while the present suit has been brought on the ground of an alleged nuisance).

No. 18—Payment

See Chapter XV, page 309 ante for precedents of plea for payment.

No. 19—Payment into Court *(n)*

1. The defendant deposits in court the sum of Rs.500 and says that the said sum is sufficient to satisfy the plaintiff's claim.

2. The plaintiff never demanded the same from the defendant before instituting the suit.

(*Or*, 1. The defendant does not admit that any interest was agreed upon as alleged in para 1 of the plaint.

2. The principal amount is due. The defendant deposits the same in court and says that it is sufficient to satisfy the plaintiff's claim.

3. The defendant was always ready and willing to pay the principal amount).

(*Form given in Appendix A, C.P.C.*)

The defendant as to the whole claim (*or* as to Rs._____ part of the money claimed, or *as the case may be*) has paid into court Rs._____ and says that this sum is enough to satisfy the plaintiff's claim (*or* the part aforesaid).

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not allege it, the defendant may take a legal objection that the plaint is bad. If he alleges it, and the defendant pleads non-service of the notice he may simply deny the plaintiff's allegation, and that will be a sufficient defence. It will not be necessary to plead that the suit is bad. A plea that the suit is barred by section 80, C.P.C. is not in proper form.

(n) See O. 24, C.P.C. It is always better for a defendant, who has no other defence, to pay the amount he considers due to the plaintiff, as that will save him from further interest and costs. He may also plead that the plaintiff had not demanded the money from him before bringing the suit, and if he proves this or any other facts showing that the plaintiff was to blame for the litigation, he will get his costs and the plaintiff will not be allowed any costs. But a plea that the plaintiff had not demanded the money from the defendant, without payment of the amount in court, would be no defence to a suit, nor would it deprive the plaintiff of his costs, unless demand was a part of the cause of action, e.g., in a suit by a customer against a banker.

No. 20—Performance Remitted*

The plaintiff by a letter written and signed on the_____and posted to the defendant which the defendant received on the _____excused the defendant from the obligation to perform the alleged promise.

(Form given in Appendix A, C.P.C.) **

The performance of the promise alleged was remitted on the (date).

No. 21—Penalty

The clause in the deed of contract (*or*, bond) on which the plaintiff bases his claim is a penalty and the defendant submits that in the event of a breach being established, the plaintiff should be allowed only a reasonable compensation which will be very much less than the penal sum provided in the said clause.

No. 22—Protest

(Form given in Appendix A, C.P.C.)

The defendant denies that he made the contract alleged or any contract with the plaintiff.

No. 23—Rescission

The contract alleged in the plaint was rescinded (*or*, the defendant was exonerated and discharged by the plaintiff from performing the alleged contract) before breach, by an arrangement between the plaintiff and the defendant made verbally on November 14, 1994.

(*Or*, The contract alleged in the plaint was rescinded by the parties before breach, by being superseded by another contract made between the plaintiff and the defendant in writing on November 14, 1994).

(Form given in Appendix A, C.P.C.)

The contract was rescinded by agreement between the plaintiff and defendant.

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*This is allowed by section 63, Contract Act and therefore unlike the English Law does not require any consideration (*Mulchand* v. *Tarachand*, 116 IC 646, A 1929 Nag 137; *Govind Singh* v. *Bijoy Bahadur*, A 1929 All 980 DB).

** This form is devoid of particulars and is as such defective.

No. 24—Registration, Invalidity of

The mortgage deed has not been duly registered as the property comprised therein wholly lies within the circle of the Sub-Registrar of _____ while the purported registration was made in the Sub-Registrar's office at _____.

No. 25—Res Judicata

(Form given in Appendix A, C.P.C.)

The plaintiff's claim is barred by the decree in suit (*give the reference*).

See also Chap. XV, page 312 ante for precedents of this plea.

No. 26—Set off *(o)*

1. As to Rs.504, part of the money claimed by the plaintiff, the defendant claims to set off the same, against the sum of Rs.300, principal and Rs.204 interest due to the defendant at the agreed rate of interest of 12 per cent per annum, on account of the price of cloth purchased by the plaintiff from the defendant on November 14, 1993.

2. As to the rest of the plaintiff's claims, the defendant confesses judgment.

(*Or*, 1. The plaintiff purchased from the defendant on January 14, 1993, two bullocks for Rs.4,000, and paid Rs.1,000 as earnest money, and the remaining Rs.3,000 is still due to the defendant from the plaintiff.

2. And the defendant claims to set-off the said sum of Rs.3,000 against the plaintiff's claim in this suit).

(*Or*, 1. The defendant admits that the plaintiff had agreed to sell and the defendant had agreed to purchase, 2,000 quintals of cotton on the date mentioned in para 1 of the plaint.

2. The defendant admits that the plaintiff suppplied 1,500 quintals of cotton to the defendant and the defendant has not yet paid the price thereof.

3. The defendant claims set-off of Rs.25,000 due to him from the

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(o) A written statement pleading set-off must be framed in an appropriate manner having regard to the provisions of O. 8, R. 6, and must bear the necessary court fee. (Also see chapter XV Page 315).

plaintiff on account of damages for the plaintiff's breach of contract to supply the remaining 500 quintals of cotton.

2. The defendant admits that the plaintiff suppplied 1,500 quintals of cotton to the defendant and the defendant has not yet paid the price thereof.

3. The defendant claims set-off of Rs.25,000 due to him from the plaintiff on account of damages for the plaintiff's breach of contract to supply the remaining 500 quintals of cotton.

Particulars : Difference between the contract price and the market rate on January 15, 1924, at Rs.10 per quintal on 500 quintals Rs.5,000).

(*Or*. 1. The plaintiff owes to the defendant the sum of Rs.2,000 on account of the price of goods sold and supplied by the defendant to the plaintiff and cost as per particulars given below :

		Rs.
Baisakh Sudi 5th, 1943 To 100 maunds of wheat @ Rs. 5 per quintal	...	500
Jeth Sudi 5th, 1943 To 50 maunds of grain @ Rs. 4 per maunds	...	200
Magh Sudi 5th, 1943 To 60 maunds of Sugar @ Rs. 20 per maunds	...	1,200
Cost of transport of wheat and jowar	...	70
Cost of transport of sugar ...	...	30
Total ...	...	2,000

2. The defendant claims a set-off of the said sum against the plaintiff's claim and prays for judgment for the amount of his claim which may be found to be in excess of the plaintiff's claim).

No. 27—Stay of Suit (Section 10, C.P.C.)

(*See Chap XV ante for precedents of stay of suit u/s 10, C.P.C.*)

No. 28—Ground of Defence Subsequent to Instiutition of Suit *(p)*

(Form given in Appendix A, C.P.C.)

Since the institution of the suit, that is to say, on the .....day of ..... (*set out facts*).

No. 29—Tender *(q)*

The defendant, on September 14, 1995, tendered Rs.500 to the plaintiff on account of the bond in suit, but the plaintiff refused to accept the same (and the defendant now deposits the same in court).

No. 30—Undue Influence *(r)*

The defendant admits that she executed the deed-of-gift alleged in para 1 of the plaint, but pleads that she was induced to do so by undue influence of the plaintiff.

Particulars of the undue influence

(i) The defendant is an illiterate *pardanashin* lady and the plaintiff is her family priest.

(ii) The plaintiff told the defendant that the defendant would be gaining an immense religious merit if she made the gift and that if she did not, the plaintiff would not pray for her soul.

(iii) The defendant had no adequate advice in the matter and she succumbed to the influence of the plaintiff.

(p) For the purpose of shortening litigation and doing complete justice to the parties the court is not precluded from taking into consideration facts which happened after the suit was filed (*Kamla Ranjan Roy* v. *Baijnath Bajoria*, 53 CWN 329).

(q) Tender of the money claimed before the suit, is a good defence against the claim for costs and interest. It must have been unconditional and of the full amount due to the plaintiff. If the tender was short it is no defence, unless the shortage was due to a *bona fide* mistake (*Abdul Rahman* v. *Nur Muhammad*, 16 B 141). Tender should be alleged in details as to when and how much was tendered. In order to make the plea fully effectual, it should be accompanied by a deposit of the money in cash (*Abdul Rahman* v. *Nur Muhammad*, 16 B 141).

(r) The relation between the parties should be shown to have been such that the plaintiff was in a position to dominate the defendant's will. It should then be shown that the plaintiff used that position to obtain an unfair advantage over the defendant (*vide* section 16, Contract Act).

(*Or*. 1. The defendant is an old man of 70 years and has been in a bad state of health and constantly ill for the last 4 years.

2. The plaintiff has, for the said last 4 years, been the medical attendant of the defendant.

3. The defendant executed the agreement to pay Rs.5,000 as fees to the plaintiff under the aforesaid undue influence of the plaintiff).

(*Or*. The defendant admits the execution of the bond, but says that when he executed the bond, the plaintiff was in a position to dominate, bad state of health and constantly ill for the last 4 years.

2. The plaintiff has, for the said last 4 years, been the medical attendant of the defendant.

3. The defendant executed the agreement to pay Rs.5,000 as fees to the plaintiff under the aforesaid undue influence of the plaintiff).

(*Or*. The defendant admits the execution of the bond, but says that when he executed the bond, the plaintiff was in a position to dominate, and did dominate, the will of the defendant and thereby induced him to agree to pay interest at 3 per cent per mensem.

Particulars

(i) The defendant was a foolish youth of dissipated habits and constantly stood in need of money for immoral purposes.

(ii) The defendant's father did not supply him with any money.

(iii) The plaintiff began to lend money to the defendant six years ago, and since then the defendant borrowed money from the plaintiff from time to time on the terms dictated by the plaintiff).

No. 31—Unsoundness of Mind

The defendant was, on the date of the alleged contract, a man of unsound mind and incapable of understanding the contract and of forming a rational judgment as to its effect upon his interests.

Urgent need of money on the part of borrower will not itself place him and the creditor in such a position that the latter would be in a position to dominate the former's will (*Sunder Kumar* v. *Sham Kishan*, 5 ALJ 199 PC). This defence is very good in the case of *pardanashin* ladies as it is for the plaintiff to prove that he had explained the effect of the transaction to her and she had agreed to it after fully understanding it. Where undue influence is alleged the questions for consideration

The defendant is a man of unsound mind and incapable of protecting his interest in the case.

(*Or*, the plaintiff is a man of unsound mind and incapable of protecting his interest in the case. He cannot, therefore, sue without a next friend).

No. 32—Wager *(s)*

The alleged agreement of sale of grain pits was made only as a wager on the price of grain of January 15th 1995 and no actual delivery of grain was intended by the parties at the time they entered into the said agreement.

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are : (1) Was the transaction a righteous transaction i.e., was it a transaction which a right-minded person might be expected to do? (2) Was it an improvident act, i.e., does it show so much improvidence as to suggest the idea that the lady was not a mistress of herself and not in a state of mind to weigh what she was doing ? (3) Was it a matter requiring legal advice ? (4) Did the intention of making the gift originate with the donor ? (*Karnamaya Debi* v. *Mahamoya Debi*, (1947) 82 CLJ 26).

(s) See *Bhagwan Sarup* v. *Burjorji*, 16 ALJ 241, for the essentials of a wagering contract. It is not sufficient that the party agreeing to deliver goods never intended to deliver them, even if the other party knew of that intention. To constitute a contract by way of wager, a *common intention* to wager is essential (*Gherulal Parkash* v. *Mahadevadas*, A 1959 SC 781) and should be pleaded. It will not be sufficient to plead the intention of one party only. The fact that a contract is highly speculative will not make it wagering; but there must be proof that it was entered into upon the term that performance should not be demanded but that difference only should become payable (*Sukhdevadas* v. *Govindass*, 26 ALJ 484 PC). A subsequent agreement to the effect that buyer has no longer right to demand delivery does not make the contract a wagering one (*Rangasa* v. *Hukumchand*, 120 IC 406, A 1930 Nag 111). A plea of wager must be specifically raised, otherwise, the court cannot give relief on that ground (*Mukat* v. *Gulab*, 1931 ALJ 363, A 1931 All 229, 132 IC 422). Though a wagering contract cannot be enforced, money deposited as margin or security can be recovered (*S.P. Bhoominathan* v. *K.S.N.Chari*, A 1944 Mad 321, 216 IC 183).

FORMS OF WRITTEN STATEMENTS

DEFENCE IN SUITS ON CONTRACTS

No. 1—Defence to a Suit for Accounts

(Plaint No.1)

In the Court of the Civil Judge (Junior Division) at Agra

ORIGINAL SUIT NO. OF 1995

Alfred Addison ... ... *Plaintiff*

versus

Muhammad Hussain ... ... *Defendant*

Written statement on behalf of the above defendant

1. The defendant admits that he was appointed by the late George Addison as his agent, as alleged in para 1 of the plaint.

2. The defendant denies the allegation in para 2 of the plaint that he began collecting rents from July 1990. Under verbal orders of the said late George Addison, the defendant began collecting rents from July 1991 and has been collecting them ever since.

3. The defendant does not admit the allegation in para 3 of the plaint that the said George Addision died intestate, but admits that the plaintiff is his son and has obtained letters of administration. The late George Addison has left a will, dated January 15, 1992, bequeathing all his property, movable and immovable, to his wife Sarah Addison, and the plaintiff is not, therefore, entitled to sue as the representative of the said George Addison.

4. The defendant denies the allegation in para 4 of the plaint that he has not rendered account of the money received by him. The defendant did render to the said late George Addison, regularly at the end of every year, full and correct account of all collections made by the defendant, up to December 1991, and has paid to him whatever was found due from the defendant.

5. The defendant denies the allegation in para 4 of the plaint that the plaintiff ever requested the defendant to render to him any accounts. The defendant is, and always has been, ready and willing to render accounts

of his collections for the period after December 1991, to the legal representative of the said George Addison.

(Sd.) Muhammad Hussain

I, Md. Hussain, declare that the contents of paras 1,2, 4 and 5 of the above written statement are true within my personal knowledge. The allegation that the late George Addison has left a will bequeathing all his property to his wife is verified on information received and believed by me to be correct. Verified at Agra this the ___ day of _____.

(Sd.) Faiyaz Ali, Advocate (Sd.) Muhammad Hassain

No. 2—Defence to a Suit on an Account Stated

(Plaint No. 8)

1. The defendants admit the allegations in para 1 and 2 of the plaint.

2. The defendants admit the allegation in para 3 of the plaint that Ram Lal went to the plaintiffs' shop on April 20, 1983, and stated an account in writing and signed a balance of Rs.2,440 in the plaintiffs' *khata bahi*, but does not admit the allegation that the said Ram Lal understood the accounts on each side. The said Ram Lal accepted, without checking or understanding it, the account as given to him by the plaintiffs.

3. The defendants assert that in the account as shown in the plaintiffs' account-books and as given by the plaintiffs to the said Ram Lal there were certain substantial errors of calculation, and the rates at which the plaintiff purchased *arhar* for the defendant firm as given in the plaintiffs' account-books were false and known by the plaintiffs' to be false, and the plaintiffs entered or got them entered in their account-books fraudulently to cause injury to the defendant firm.

Particulars of the fraudulent entries

20-6-1984 — The market rate of *wheat* was Rs. per kg. Plaintiff has charged Rs. per kg. on ..... kgs. purchased for the defendant.

Difference—Rs.....

10-10-1984 — The market rate of *cotton* was Rs. per kg. Plaintiff has charged Rs. per kg. on .....kgs. purchased for the defendant.
Difference—Rs.....

Particulars of errors

20-6-1984 — Commission at Rs. per kg. on kg. of *wheat* comes to Rs. Plaintiff has charged Rs .
Difference—Rs.....

20-7-1984 — Price of kg. of *rice* at Rs. per kg. comes to Rs. . Plaintiff has charged Rs.
Difference —Rs.....

3-8-1984 — Price of kg. of sugar at Rs. per kg. sent by defendant firm comes to Rs. Plaintiff has credited only Rs.
Difference—Rs. _____

Total difference in favour of defendant—Rs._____.

4. The defendant denies that he has not paid anything since April 20, 1983. The defendant paid, through the said Ram Lal, a sum of Rs.1.500 to the plaintiff on April 24, 1983.

No. 3—Defence to a Suit by an Agent for Money Paid on Behalf of the Principal

(Plaint No. 16)

1. The defendant denies that interest was agreed to be paid at one percent and says that it was agreed to be 0.75 per cent per mensem. The defendant admits the rest of the allegations in para 2 of the plaint.

2. The defendant admits the allegations in para 1,3,4 and 6 of the plaint.

3. The defendant admits the allegation in para 5 of the plaint that by letter, dated November 30, 1994, he instructed the plaintiff to sell the said 200 bags of wheat at the market rate, but does not admit that the plaintiff sold the said bags of wheat. The plaintiff had secretly, and against the directions of the defendant, sold the said 200 bags of wheat on November 12, 1994, at Rs.____ per quintal and must account to the defendant for the profits which have accrued by the sale.

No. 4—Defence to an Agent's Suit in Respect of *Khatti* Transactions

(Plaint No. 17)

1. The defendant admits the allegations in para 1 of the plaint.

2. The defendant denies the existence of the custom alleged by the plaintiff in the first sentence of para 2 of the plaint as authorising a commission agent to sell the *khattis* purchased by him for his principal. The defendant denies that there is any custom to pay anything on account of contribution to school or servant's expenses or on account of correspondence expenses. He admits custom about payment of commission, brokerage, charity and *gaoshala*. The defendant admits the custom about payment of interest as alleged in the 3rd sentence of para 2 of the plaint.

3. The defendant admits the allegation in para 3 of the plaint.

4. The defendant denies the allegation in para 4 of the plaint that the plaintiff had expressly stated that the purchase would be subject to the conditions mentioned in para 2 or that the defendant had expressly agreed to all or any of those conditions.

5. The defendant admits the allegation in para 5 of the plaint that the rate began to fall soon after the aforesaid purchase, but does not admit that on September 6, 1982, it was as stated in para 5 of the plaint.

6. The defendant admits the allegation in para 6 of the plaint.

7. The defendant does no admit the allegation in para 7 of the plaint that no reply was received by the plaintiff or that the plaintiff then or ever sent a reminder through a special massenger or otherwise. The defendant sent a letter to the plaintiff on September 9, 1982, through his *munim*, Mussaddi Lal, denying the plaintiff's right to call for more advance money, and expressly forbidding the plaintiff to sell the *khattis* without the defendant's instructions.

8. The defendant denies the allegation in para 8 of the plaint that he sent his *munim*, Mussaddi Lal, to the plaintiff on September 25, 1982, or on any day after September 9, 1982. The defendant does not admit that the said Mussaddi Lal ever asked the plaintiff to sell the *khattis*. Alternatively, the defendant says that he had given no authority to the said Mussaddi Lal to ask the plaintiff to sell the aforesaid *khattis*.

9. The defendant does not admit that the plaintiff sold the *khattis* to Ram Bilas or to any other person, or that the plaintiff sold them at the rates alleged in para 9 of the plaint. Alternatively, the defendant pleads that the sale being unauthorised and against the defendant's instructions, the plaintiff cannot recover any loss sustained thereby.

10. In view of the reply above to para 2 and 4 of the plaint no separate reply is required in respects of para 10 of the plaint.

11. The defendant does not admit any of the allegations in para 11 of the plaint.

No. 5—Defence to suit by the Assignee of a Debt

(Plaint No. 21)

1. The defendant admits the allegation in para 1 of the plaint.

2. The defendant does not admit that Ram Prasad, obligee of the bond, assigned the debt to the plaintiff as alleged in para 2 of the plaint, or at all.

3. In the alternative, the defendant pleads that the plaintiff being an

Advocate, the assignment of the debt alleged by him is against law, and the plaintiff cannot enforce the claim.

4. The defendant admits that he has not paid the debt to the plaintiff, but pleads that he has paid the whole of the debt to the said Ram Prasad on April 13, 1995.

No. 6—Defence in Suits on Bonds

(Plaints No. 23 to 26)

(*Form No. 2, Appendix A, C.P.C.*)

1. The bond is not the defendant's bond.

2. The defendant made payment to the plaintiff on the day according to the condition of the bond.

3. The defendant made payment to the plaintiff, after the day named and before suit, of the principal and interest mentioned in the bond.

No. 7—Defence to Suit on an Instalment Bond

(Plaint No. 24)

1. The defendant admits all the allegations made by the plaintiff in para 1 of the plaint.

2. Of the allegations in para 2 of the plaint, the defendant admits that he paid the first instalment on due date, that he did not pay the 2nd instalment on due date, and that the plaintiff accepted payment of the said instalment three days after the due date. But the defendant denies that the plaintiff had verbally or otherwise agreed to waive the benefit of the acceleration clause in the bond. On the contrary, the plaintiff had expressly told the defendant that he would not accept payment by instalments any longer.

3. Under the acceleration clause of the bond, the whole money became payable on July 1, 1982, and the suit is, therefore, barred by Article 37 of the Limitation Act 1963.

4. The defendant denies the allegations in para 3 of the plaint that the defendant has not paid anything. The defendant has made the following payments:

Rs.300 on November 25, 1982.

Rs.150 on December 15, 1982.

Rs.200 on February 20, 1983.

Total Rs.650.

No. 8—Defence to a Suit for Cancellation of a Sale-Deed

(Plaint No. 29).

1. The defendant admits the allegation in para 1 of the plaint.

2. The defendant denies that he made the representations alleged in paras 2, 5 and 6 of the plaint, or that the plaintiff assented to a proposal of executing a power of attorney or that she asked the defendant to have a power of attorney drawn up.

3. The defendant admits the allegation in para 3 of the plaint that on December 22, 1994, he took to the plaintiff a document, but denies that he represented to the plaintiff that it was a general power of attorney or that he induced the plaintiff by such representation to affix her thumb mark on to it. The plaintiff had, by her free will and consent, agreed to sell her holdings in village Nalagarh to the defendant in consideration of debt of Rs.15,000 due to the defendant from the plaintiff's deceased husband Ram Lal on a pronote, dated January 4, 1992. The sale-deed was drawn up under the plaintiff's instructions and she put her thumb mark on it, well knowing that it was a sale-deed.

4. The defendant admits the allegation in para 4 of the plaint that he took the Sub-Registrar of Ghazipur to the plaintiff's house but denies that the said Sub-Registrar did not read out or explain the contents of the deed to the plaintiff. The said Sub-Registrar had read out the deed and had fully explained to the plaintiff its purport and effect, and the plaintiff had admitted before him the execution of the sale-deed, and the said Sub-Registrar then registered the said deed according to law.

5. The defendant denies the allegation in para 5 of the plaint that the plaintiff has now learnt that the deed was a deed of sale and says that she has well known that fact ever since she executed the said deed.

6. The defendant admits the allegation in para 7 of the plaint.

No. 9—Defence to a Suit for Cancellation of Will

(Plaint No. 30)

1. The defendant admits the allegations in paras 1-3 of the plaint.

2. The defendant does not admit the allegation in paras 4 and 5 that the said Ram Prasad did not execute the said will or that he was not in his proper senses when he executed it, or that he was incapable of understanding his affairs, or that he was totally unconscious or could not hear or talk to anyone on April 14, 15 or 16, 1995.

3. The said Ram Prasad duly executed the said will, while he was in full possession of his senses, and fully able to understand the effect of it.

No. 10—Defence to a Suit for Contribution

(Plaint No. 34)

1. The defendant admits the allegation in para 1 of the plaint regarding the purchase of the house, but denies that he and the plaintiff remained jointly in possession of the said house. The defendant asserts that the house remained in the exclusive possession of the plaintiff from the date of purchase to the date of delivery of possession to Sri Narayan.

2. The defendant admits the allegation in para 2 of the plaint.

3. The defendant denies the allegation in para 3 that he and the plaintiff agreed to defend the suit jointly, but admits that the plaintiff incurred all the costs. He does not admit that the costs incurred by the plaintiff amounted to Rs.3,200.

4. The defendant admits the allegation in para 4 relating to the obtaining of a decree by Sri Narayan, but does not admit that Sri Narayan realised Rs.14,000 or any other sum, from the plaintiff.

5. The defendant had come to know that Ram Narayan was not the adopted son of Sant Lal, and was not therefore willing to defend the suit of Sri Narayan. The plaintiff was bent on defending it and prevailed upon the defendant to join, and the defendant did join the defence, on the express agreement made verbally by the plaintiff, that the defendant would not be liable either for the cost of the defence or for the costs of Sri Narayan.

No. 11—Defence to a Suit for Refund of Decree-Money

(Plaint No. 37)

1. The defendant admits the allegation in para 1 of the plaint that the plaintiff paid to him Rs.800 but does not admit that the payment was made on account of the said decree or that the defendant agreed to credit the money towards the said decree.

2. The defendant admits the allegation in para 2 of the plaint.

3. The plaintiff owed on the date of the said payment, and still owes, to the defendant money under a bond, dated June 14, 1992.

4. The plaintiff did not, at the time of making the said payment, intimate to the defendant to which debt the payment was to be applied. The defendant appropriated and credited the payment towards the debt due under the said bond.

No. 12—Defence to a Suit for Dower

(Plaint No. 42)

1. The defendants admit the allegation in para 1 of the plaint about the plaintiff's marriage, but do not admit that the dower fixed was Rs.10,000. The defendants aver that the plaintiff's dower was only Rs.2,000, out of which Rs.1,000 was prompt, and Rs.1,000 was deferred.

2. The defendants admit allegations in paras 2,3 and 5 of the plaint.

3. The defendants deny the allegation in para 4 of the plaint that the dower debt has remained unpaid.

Additional Pleas

4. Mt. Ilahi Jan had demanded her prompt dower from Khuda Baksh, in December, 1968 and the said Khuda Baksh had paid her Rs.1,000 on account of the prompt dower in the said month of December, 1968.

5. In the alternative, the defendants plead that the said Khuda Baksh, refused to pay her the prompt dower in December, 1968 and the claim for that is now barred by Article 113, Limitation Act, 1963.

6. At the time of the death of the said Khuda Baksh, Musammat Ilahi Jan had verbally relinquished her dower debt, and the said debt has thus been discharged.

7. In the alternative, the defendants plead that Musammat Ilahi Jan took possession of the house at No. 25, Cotton Street, Calcutta, in lieu of her dower debt, and as the profits of that house, being Rs.2,400 a year were more than her legal share in the whole income of the assets of the said Khuda Baksh (such legal share being only Rs.1,900 a year), the plaintiff must, in any case, account for the profits of the said house realised by Musammat Ilahi Jan.

No. 13—Defence in Suits on Guarantee

(Plaint nos. 43,44 and 45)
(*Form No. 3, Appendix A, C.P.C.*)

1. The principal satisfied the claim by payment before suit.

2. The defendant was released by the plaintiff giving time to the principal debtor in pursuance of a binding agreement.

No. 14—Defence to a Suit on an Implied Indemnity

(Plaint No. 52)

1. The defendant admits the allegations made in paras 1, 2, and 4 of the plaint subject to the Additional Pleas.

2. The defendant admits the allegations in Para 3 of the plaint that Ram Chandra has obtained a decree against the plaintiff but does not admit that the plaintiff has paid Rs.24,543, or any other sum to the said Ram Chandra.

Additional Pleas

3. The defendant did offer Rs.22,000 to Ram Chandra in full discharge of his mortgage, but the said Ram Chandra replied that Rs.23,864 was due to him and refused to accept any smaller sum.

4. On August 20, 1991, the defendant informed the plaintiff of the aforesaid facts whereupon the plaintiff promised to provide Rs.1,864 and to go with the defendant to the said Ram Chandra to have the mortgage redeemed.

5. The defendant has always been ready and willing to pay Rs.22,000 but he plaintiff himself failed to provide Rs.1,864 and to accompany the defendant to the said Ram Chandra to have the mortgage redeemed.

No. 15—Defence to a Suit for Ejectment

(Plaint No. 64)

1. The defendant admits that he held the house in suit as the plaintiff's tenant, but does not admit that his tenancy commenced on March 25, 1992. The said tenancy commenced on April 1, 1992.

2. The defendant admits service of the notice alleged in para 2 of the plaint, but does not admit that the plaintiff duly determined the defendant's tenancy thereby. The notice did not expire with the month of tenancy and was not according to law.

(NOTE :—*In U.P. the notice need not end with the month of tenancy (U.P. Act 24 of 1954). So this defence is not available in U.P. But the notice in U.P. must be for a period of 30 and not 15 days*].

3. The defendant admits that he has not paid the rent claimed by the plaintiff. The same was tendered to the plaintiff out of court (*or*, by money order) on October 25, 1994, but the plaintiff refused to accept it. The defendant has unconditionally paid into court the sum of Rs.2,100 on January 31, 1995 to the credit of the plaintiff.

No. 16—Defence to a Suit for Ejectment on the Ground of Denial of Title

(Plaint No. 67)

1. The defendant admits the allegations in paras 1 and 3 of the plaint, subject to Additional Pleas.

2. The defendant admits the allegations in para 2 of the plaint that in his written statement in Suit No.22 of 1995, he stated that the plaintiff had no title to the house but denies that he stated that the defendant was the owner of the said house.

Additional Pleas

3. The plaintiff is not the owner of the said house, but the owner of

it is one Sayyid Muhammad Husain of Burdwan and the plaintiff is the local manager of the said Sayyid Muhammad Husain, and had let the house to the defendant expressly on behalf of, and as agent of the said Sayyid Muhammad Husain.

4. In the alternative, the alleged forfeiture was waived by the plaintiff on August 20, 1995, by accepting rent for the month of July, 1995, from the defendant.

No. 17—Defence to a suit for Wrongful Dismissal

(Plaint No. 73)

1. The defendant admits the allegation in paras 1, 2 and 4 of the plaint, subject to the Addtional Pleas.

2. The defendant admits the allegation in para 3 of the plaint that he dismissed the plaintiff by letter dated June 10, 1995, without giving any notice as required by the terms of employment, but denies that the dismissal was wrongful.

Additional Pleas

3. The defendant was induced to take the plaintiff in his employment by the plaintiff, on June 20, 1994, verbally representing and warranting to him that he, the plaintiff, was then reasonably competent to perform the service for which he was engaged, viz., that of helping the defendant in editing the daily paper, "The Tribune," whereas the plaintiff was not then, nor has he since been reasonably competent to perform the said service; and therefore the defendant rescinded the contract and dismissed the plaintiff (*or*, the plaintiff misappropriated Rs. 2,500 which he had received on behalf of the defendant and did not credit the same in the account register which he kept in discharge of his duties, and was thus guilty of gross misconduct, and therefore the defendant rescinded the contract and dismissed the plaintiff).

4. The defendant offered to pay Rs.2,500 to the plaintiff on account of pay up to June 10, but the plaintiff declined to accept it. The defendant pays into court the said sum in full satisfaction of the plaintiff's dues.

No. 18—Defence in any Suit for Debt

(Form No. 4, Appendix A, C.P.C.)

1. As to Rs.200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff.

Particulars are as follows :

1907, January 25	...	...	...	150
1907, February 1	...	...	...	50
		Total	...	200

2. As to the whole [*or*, as to Rs._____, part of the money claimed] the defendant made tender before suit of Rs. _____, and has paid the same into court.

No. 19—Defence to Suit Under Section 69 Contract Act

(Plaint No. 79)

1. The defendant admits the allegation in para 1 of the plaint that in execution of decree No.545 of 1991, Ram Lal attached the house. The said house belonged to the defendant.

2. The defendant does not admit that the plaintiff paid Rs.4,564 or any other sum as alleged in para 2 of the plaint, and alleges that the said payment, if made, was made voluntarily and fraudulently in order to establish a false claim to the said house.

No. 20—Defence of Junior Member of a Hindu Family to Suit for Redemption of Mortgage by Manager

(Plaint No. 88)

1. The defendant does not admit the mortgage alleged by the plaintiff in paras 1 and 2 of the plaint.

2. The defendant admits that the allegedly mortgage property is ancestral, that the defendant and the alleged mortgagor were members of a joint Hindu family and that the latter was the manager of the said family.

3. (a) The defendant does not admit the allegation in para 3 of the plaint that the alleged mortgage was made for the necessity alleged in the plaint, or for any legal necessity (*or*, the defendant does not admit the alleged antecedent debt), [*or*, (*if the mortgagor was not the father*) the

defendant does not admit that the alleged antecedent debt was taken for the necessity alleged in the plaint or for any legal necessity], [*or*, (*if the mortgagor was the father*) the alleged antecedent debt was taken to pay off gambling losses (give particulars)].

(b) In the alternative, the defendant denies that there was any necessity to borrow money at the rate of interest stipulated in the mortgage-deed.

4. The defendant does not admit the allegation in para 4 of the plaint in respect of any representations made to or inquiries made by the plaintiff.

No. 21—Defence to Suit for Foreclosure

(Form No. 11, Appendix A. C.P.C.)

1. The defendant did not execute the mortgage.

2. The mortgage was not transferred to the plaintiff (*if more than one transfer is alleged, say which is denied.*)

3. The suit is barred by Article————of the Limitation Act, 1963.

4. The following payments have been made, viz. :

	Rs.
(*Insert date*)	1,000
(*Insert date*)	500

5. The plaintiff took possession on the _____ of and has received the rents ever since.

6. The plaintiff released the debt on the ___ day of _____.

7. The defendant transferred all his interest to AB by a document, dated _____.

No. 22—Defence of a Mortgagee Claiming Priority

On the _____ the plaintiff orally represented to the answering defendant that his mortgage had been satisfied and that his mortgage-deed had been lost whereby the answering defendant was induced to advance money to defendant No.1 on the security of the mortgaged property. The answering defendant therefore claims that the plaintiff's mortgage is postponed to the answering defendant's mortgage.

No. 23—Ditto

The mortgaged property was, prior to the mortgage in suit, mortgaged to one AB under a mortgage deed dated the ___ and registered on the _____. The answering defendant has redeemed the said mortgage of AB on the___ by paying to him Rs. _____on account of his mortgage and claims to have acquired priority against the plaintiff.

No. 24—Defence to Suit for Redemption

(Form No.12, Appendix A, C.P.C.)

1. The plaintiff's right to redeem is barred by Article _____ Limitation Act 1963.

2. The plaintiff transferred all his interest in the property to AB.

3. The defendant, by a document, dated the __day of _____ transferred all his interest in the mortgage-debt and property comprised in the mortgage to AB.

4. The defendant never took possession of the mortgaged property, or received the rent thereof.

(If the defendant admits possession for a time only, he should state the time, and deny possession beyond what he admits).

No. 25—Defence to Redemption Suit

(Plaint No. 93)

1. The defendant does not admit the allegation in the plaint that the plaintiff is the mortgagor and the defendant is the mortgagee of the property in suit.

2. The defendant does not admit the mortgage alleged in para 2 of the plaint.

3. The defendant does not admit the allegations in paras 3 and 4 of the plaint about deposit of the mortgage money under Section 83, Transfer of Property Act, or the issue of a notice against the defendant by the court. The defendant denies that any such notice was served upon him.

Additional Pleas

4. The suit is not maintainable without a tender of the mortgage money.

5. In the alternative, the defendant pleads that the suit is not maintainble without a previous offer of redemption made in the month of *Jeth*.

6. The amount of the mesne profit claimed is excessive.

No. 26—Defence Claiming Marshalling

Of the serveral items of the mortgaged property which the plaintiff claims to sell, the following items alone are mortgaged to the answering defendant and the answering defendant prays that the plaintiff should be required to marshal.

No. 27—Defence to a Payee's Suit on a *Hundi*

(Plaint No. 104)

1. The defendant admits the allegation in para 1 of the plaint.

2. The defendant does not admit the allegation in para 2 of the plaint that the plaintiff presented the *Hundi* to the said firm Lachmi Narain Panna Lal at their place of business at Kanpur after maturity, or at all, or that the said firm refused to honour or accept it.

3. The defendant does not admit the allegation in para 3 of the plaint that the plaintiff sent any notice of dishonour to the defendant. The defendant did not, at any rate, receive any such notice.

Additional Pleas

4. The said *Hundi* was drawn against the price and charges of 100 bags of wheat which the plaintiff had agreed to despatch to the defendant within 10 days of receiving the said Hundi, but the plaintiff has not despatched the said or any bags within the said time or at all.

No. 28—Defence to a Suit on a Promissory Note

(Plaint No. 106)

1. The defendant admits that he executed a promissory note on December 6, 1993 for Rs.1,000 and that he has not paid the same or any part thereof to the plaintiff.

2. The defendant denies that interest was payable under the said promissory note at 1 per cent per mensem. Under the promissory note as originally written, the defendant had agreed to pay interest at 1 per cent

per annum. The said promissory note has been materially altered by alteration of the word "*Salana*" into "*Mahana*" hence no suit is maintainable on it.

No. 29—Defence to a Suit for Dissolution of Partnership

(Plaint No.108)

1. The defendant admits the partnership agreement alleged in para 1 of the plaint but denies that it was agreed that the parties should contribute equally to the capital and should share equally the profit and loss. The plaintiff contributed 1/3rd and defendant contributed 2/3rd towards the capital and they agreed to share the profits and losses in the same ratio.

2. The defendant admits the allegation in para 2 of the plaint as regards the giving of a loan of Rs.2,000 to his nephew and the borrowing of Rs.1,500 from the Allahabad Bank, but denies that these acts amount to any misconduct. Both the giving and the taking of the said loans were done with the consent and approval of the plaintiff.

Additional Plea

3. The partnership has, on January 4, 1995, been by mutual consent and by a verbal agreement, dissolved and the accounts have been settled and squared up between the parties on the said date.

No. 30—Defence to a Suit for Price of Goods Sold

(Plaint No. 129)

1. The defendant admits the agreement about sale and purchase of grain and sugar alleged in para 1 of the plaint, but denies that it was agreed that the defendant should pay the price on delivery or should pay interest at 9 per cent per annum or at any other rate. It was verbally agreed on the said January 4, 1994, at the time of the agreement of sale of grain and sugar that an account should be made and settled, on December 31 every year, and this suit has been filed before December 31, 1994.

2. The defendant admits that all the goods mentioned in the plaintiff's particulars given in para 2 of the plaint were sold and delivered to him except that 50 bags of sugar were not sold and delivered on April 20,

1995. Only 40 bags of sugar were sold and delivered by the plaintiff to the defendant on the said date.

3. The defendant admits the allegation in para 3 of the plaint that no price was fixed between the parties. The defendant also admits the correctness of the plaintiff's particulars of the amount due to him, except that on April 20, 1995, the price and other charges of 40 bags of sugar only, and not of 50, should be debited against the defendant and therefore the amount due to the plaintiff for the price and other costs of goods sold and delivered to the defendant should be Rs.48,900 only and not Rs. 54,337.

No. 31—Defence in Suit for Goods Sold and Delivered

(Form No. 1, Appendix A, C.P.C.)

1. The defendant did not order the goods.
2. The goods were not delivered to the defendant.
3. The price was not Rs._____.

[*or*]

4. 5. 6. — Except as to Rs. _____, same as 1. 2. 3.

7. The defendant [*or* AB, the defendant's agent] satisfied the claim by payment before suit to the plaintiff [*or* to CD, the plaintiff's agent] on the day ___ of _____ 19 __.

8. The defendant satisfied the claim by payment after suit to the plaintiffs] on the day ___ of _____ 19___.

No. 32—Defence to a Suit for not Accepting Goods Purchased

(Plaint No.131)

1. The defendant admits the allegations contained in para 1 of the plaint, but pleads that by a previous letter dated January 10, 1995, the defendant had asked the plaintiff to send him only first class white sugar, and the letter of January 14, 1995 referred to in para 1 of the plaint was intended to refer to the same quality of sugar.

2. The defendant admits the allegation in para 2 of the plaint, but says that the sugar sent by the plaintiff was not first class white sugar. It was brown sugar of very inferior quality for which there was no market at Patna.

3. The defendant admits the allegation in para 3 of the plaint that he refused to accept delivery of the sugar sent by the plaintiff and pleads that he did so as the sugar was not of the quality indented for.

No. 33—Defence to a Suit for not Accepting Delivery of Part and for Price of Part Accepted

(Plaint No.134)

1. The defendant admits the allegation in para 1 of the plaint, but adds that the 18 cases of coloured glazed paper were sold by sample and were warranted equal to sample. The said warranty was verbal and was given on August 20, 1980.

2. The defendant admits acceptance of delivery of two lots each of 6 cases of the glazed paper alleged in para 2 of the plaint, but pleads that they were not of the description or quality warranted and were inferior to sample, and the defendant refused to accept the same and gave notice to the plaintiff that they remained on the defendant's premises at the plaintiff's risk.

3. The plaintiff refused to deliver glazed paper according to sample on December 20, 1980, but insisted that he would deliver paper of the same quality as that sent in October and November, 1980, and it was such glazed paper only which the plaintiff was ready and willing to deliver and which the defendant refused to accept.

4. The defendant admits that he did not pay the price of the glazed paper delivered by the plaintiff.

No. 34—Defence to a Suit for Price of Articles Prepared to Order

(Plaint No. 142)

1. The defendant admits the allegation in para 1 of the plaint and pleads that the said necklace was required by the defendant, as the plaintiff well knew, for presentation to his niece on the occasion of the latter's

marriage which was fixed for January 14, 1996, and that the time of one month fixed by the agreement was, therefore, of the essence of the contract.

2. The defendant admits that the plaintiff did make a necklace and offered it to the defendant on January 10, 1996 but denies that it was of the specification agreed upon. The said necklace was studded with rubies of 1.5 *ratti* each instead of 2 *ratti* and was different from the agreed pattern in the following particulars : (*Points of difference*).

No. 35—Defence to Suit for Specific Performance

(Form No. 13, Appendix A, C.P.C.).

1. The defendant did not enter into the agreement.

2. AB was not the agent of the defendant (*if alleged by plaintiff*)

3. The plaintiff has not perfomed the following conditions:- (*conditions*)

4. The defendant did not —(*alleged acts of part performance*).

5. The plaintiff's title to the property agreed to be sold is not such as the defendant is bound to accept by reason of the following matters — (*state why*).

6. The agreement is uncertain in the following respects— (*State them*).

7. (*Or*) The plaintiff has been guilty of delay.

8. (*Or*) The plaintiff has been guilty of fraud (*or*, mis-representation).

9. (*Or*) The agreement is unfair.

10. (*Or*) The agreement was entered into by mistake.

11. The following are particulars of (7), (8), (9), (10), (*or, as the case may be*).

12. The agreement was rescinded under conditions of sale, No.11 (*or*, by mutual agreement).

(*In cases where damages are claimed and the defendant disputes his liability to damages, he must deny the agreement or the alleged breaches, or show whatever other grounds of defence he intends to rely on, e.g., the Limitation Act, accord and satisfaction, release, fraud etc.*)

No. 36—Defence to a Vendor's Suit for Specific Performance

(Plaint No.148)

1. The defendant admits the allegations contained in para 1 of the plaint.

2. The defendant does not admit the allegation in para 2 of the plaint that the plaintiff required the money by December, 16, 1995, and denies that the defendant had notice of this fact or that time was intended to be the essence of the contract.

3. The said contract was, by mutual verbal agreement, on December 14, 1995, rescinded and the earnest money was forfeited.

4. In the alternative, the defendant, denies that the plaintiff was ready and willing on the date fixed to execute a proper deed of sale or had called upon the defendant to perform his part of the contract, or that the defendant failed to do so. The defendant was always ready and willing to perform his part of contract, but the plaintiff himself neglected to execute a proper deed of conveyance.

Additional Plea

5. In the alternative, the defendant pleads that plaintiff is not the sole owner of the property, he contracted to sell and cannot transfer to the defendant a right free from doubt and dispute. The defendant has learnt, after the contract, that the plaintiff's brother Babu Ram has also a share in the said property.

No. 37—Defence to a Suit for Breach of Contract to do Work within Time

(Plaint No.161)

1. The defendant admits the allegation in para 1 of the plaint.

2. The defendant admits the allegation in para 2 of the plaint that the plaintiff brought the car to the defendant but does not admit that the plaintiff told him that he required the car to be in perfect running order by April 25, in order to carry passengers from Jammu to Srinagar, or for any other purpose, or that the plaintiff told the defendant that, if the car was

not in perfect running order by that date, the plaintiff would lose a profit of Rs.1,000 a week, or any profit.

3. The defendant admits the allegation in para 3 of the plaint that he agreed to put the car into running order, but denies that he agreed to do so by April 25, or by any other date. The defendant agreed to do so within reasonable time.

4. The defendant admits that he did not deliver the car to the plaintiff on April 25, but did so on June 6, 1995. He says that June 6, 1995 was a reasonable time.

Additonal Plea

5. The defendant contends that the damages claimed are too remote in law.

DEFENCE IN SUITS ON TORTS

No. 38—Defence in all Suits for Wrongs

(Form No. 6, Appendix A, C.P.C.)

Denial of the several acts [*or* matters] complained of.

No. 39—Defence to a Suit for Damage to Plaintiff's Crop by Defendant's Cattle

(Plaint No.166)

1. The plaintiff's field No.512 is situated on the highway leading from the *abadi* of the village to the pasture land.

2. The said bullocks were being lawfully driven by the defendant's servant along the said highway, and they strayed upon the plaintiff's field, without any negligence on the part of the defendant or of his said servant.

No. 40—Defence to a Suit for Damages for Wrongful Attachment before Judgment

(Plaint No.170)

1. The defendant admits the allegations in paras 1 and 2 of the plaint.

2. The defendant denies the allegation in para 3 of the plaint that he obtained the said order maliciously or without any reasonable and probable

cause or knowingly made a false allegation that the plaintiff was intending to dispose of his stock-in trade. The defendant had a reasonable cause for making the application and the said allegations.

Particulars : The plaintiff's neighbours Ram Lal, Bishen Lal and Kishen informed the defendant on August 1, 1984, that the plaintiff was intending to dispose of his sotck-in trade and had negotiated with them. The defendant believed this information to be true.

Additional Plea

3. The plaintiff had made an application under section 95, C.P.C., which was dismissed by the Civil Judge (Junior Division) by an order, dated January 14, 1985. The present suit is, therefore, not maintainable.

No. 41—Defence to Suit for Conspiracy to Defraud a Decree-Holder

(Plaint No.171)

1. The defendants admit the allegations in para 1 of the plaint.

2. The defendant do not admit the allegations in paras 2 and 3 of the plaint that the plaintiff obtained a decree against defendant No.1 or that the plaintiff made attempts to execute it or that he obatined a warrant of attachment of any house, transistors or scooter.

3. The defendants deny the allegation in para 4 of the plaint that they conspired with the defendant No.1 to defraud the plaintiff and to prevent him from recovering his decretal money by means of execution, or for any other purpose.

4. The defendants' acts alleged in para 5 of the plaint are admitted but it is denied that they, or any of them, were done in pursuance of any conspiracy.

5. The defendant Nos.2 and 3 purchased the transistors and defendant No.4 purchased the house from defendant No.1 in good faith and for value.

6. Defendant No.2 purchased the scooter in good faith for price paid in cash to the defendant No.1 and rightfully took it away to his own house.

7. The defendants admit the allegations in para 6 of the plaint.

Additional Pleas

8. The plaintiff's decree is still capable of execution and the plaintiff has suffered no damage.

9. In the alternative, the defendants contend that the damages claimed are too remote in law.

No. 42—Defence in Suits for Infringement of Copyright

(Form No. 8, Appindix A, C.P.C.)

1. The plaintiff is not the author (*assignee*, etc.)

2. The book was not registered.

3. The defendant did not infringe.

No. 43—Defence in Suits for Detention of Goods

(Form No. 7, Appendix A, C.P.C.)

1. The goods were not the property of the plaintiff.

2. The goods were detained for a lien to which the defendant was entitled.

Particular are as follows :

1907, May 3. To carriage of the goods claimed from Delhi to Calcutta :

45 Maunds, at Rs. 2 per maund ... ... Rs. 90

No. 44—Defence to a Suit for Movables Inherited by the Plaintiff

(Plaint No.175)

1. The defendant does not admit the allegation in para 1 of the plaint that Rahim Baksh was owner of the whole property entered in the plaint schedule. He was owner only of one cow and one she-buffalo and 20 quintals of wheat.

2. The defendant does not admit the allegation in para 2 of the plaint that he left no heir except the plaintiff or that the defendant was his kept mistress. The defendant was his lawfully wedded wife.

3. The defendant denies the allegation in para 3 of the plaint that she

took possession of the whole of the property entered in the plaint schedule or has retained it since. She took possession of one cow and one she-buffalo and 5 quintals of wheat only and has retained the said cow and she-buiffalo since. She sold the said 5 quintals of wheat for Rs.2,120 and spent that money on the funeral expenses of the said Rahim Baksh. A full account of such expenses has been given in the schedule attached to this written statement.

Additional Pleas

4. On November 4, 1995, shortly before his death, the said Rahim Baksh verbally gave the said cow and she-buffalo to the defendant in satisfaction of her dower debt which was Rs.5,500.

5. In the alternative, the defendant has been in possession of the said cow and she-buffalo in lieu of her dower debt of Rs.5,500.

No. 45—Defence to a Suit for Obstruction of a Right of Way

(Plaint No.180)

1. The defendant admits the allegation in para 1 of the plaint.

2. The defendant denies that the plaintiff was entitled to the right of way alleged in paras 2 and 3 of the plaint.

3. The plaintiff has not enjoyed the alleged right of way for 20 years or at any time within two yerars of the institution of this suit.

4. If he has so enjoyed it, such enjoyment has not been as of right, but has been a secret enjoyment without the knowledge of the defendant and his predecessors-in-title.

(*Or*, the said enjoyment was with the permission and licence of the defendant. The defendant gave the said permission verbally to the plaintiff in the month of April, 1972, when the plaintiff had planted new trees in his grove).

If easement of necessity is claimed, state— The alleged way is not absolutely necessary, as the plaintiff can reach the highway from his grove by another way, viz. across the open space of ground belonging to the plaintiff and lying to the north of the defendant's grove No.513).

5. The defendant admits obstruction of the plaintiff's alleged way, but denies that the said act was unlawful.

No. 46—Defence to Suit for Obstruction of Light and Air

(Plaint No.185)

1. The plaintiff has not enjoyed the use of the light and air for 20 years before the suit.

2. The plaintiff has not enjoyed the use of the light and air within two years of the institution of this suit. The defendant's wall obstructing the light and air of the plaintiff, was built in, and has been in existence, since February 1982.

3. The plaintiff had three large windows in his said room on the east side, through which sufficient light and air used to enter the plaintiff's house. The said windows existed for more than 30 years, and the plaintiff has himself closed them two months before bringing this suit.

4. The defendant denies that the plaintiff's house was rendered unfit for comfortable habitation by the defendant obstructing the plaintiff's western windows. On the other hand, it has been rendered so by the plaintiff closing his eastern windows.

(*Or*, the defendant denies that the plaintiff's house has been rendered unfit for comfortable habitation, or that the obstruction complained of prevents him from carrying on his business as a tailor, or has materially diminished the value of the house. The house receives a sufficient quantity of light and air by two windows in the northern wall).

No. 47—Defence to a Suit for Interference with a Right of Privacy

(Plaint No.186)

1. The defendant denies that the plaintiff has been using his house adjoining the defendant's house as a residence of his ladies, for 50 years or for any considerable period. The said house was formerly used as a godown for storing plaintiff's timber and fodder, and the plaintiff turned it into a residential house for this family only one year ago, after the defendant had started construction of his upper storey.

2. In the alternative, the defendant contends that the plaintiff's house is visible from the public road on the north which is on a much higher level than the houses of the parties, and from the window of the neighbouring houses belonging to Radha Mohan, Gopal Prasad and Dwarka Prasad, and the right of privacy claimed by the plaintiff has not been substantially enjoyed.

No. 48—Defence to a Suit for False Imprisonment

(Plaint No.189)

1. The defendant admits the allegations in para 1 of the plaint.

2. As regards para 2 of the plaint, the defendant No.1 denies having arrested the plaintiff or having detained him for two hours or for any length of time, or having given him into the custody of defendant No.2. On the occasion mentioned in para 2 of the plaint, Khuda Baksh, the son of defendant No.1, asked the plaintiff not to go near the tent of defendant No.1. The plaintiff thereupon began to abuse the said Khuda Baksh, and when the said Khuda Baksh asked him not to use abusive language, the plaintiff threatened to beat him, and flung his shoe at him. The defendant No.1 was then sitting in his tent and was talking to defendant No.2. On hearing the plaintiff abusing the said Khuda Baksh, both the defendants came out of the tent and defendant No.2 asked the plaintiff to give him his name and address. The plaintiff refused to give his name and address, and defendant No.2 thereupon, lawfully and gently, and without using any unnecessary force, arrested the plaintiff and detained him in the tent of defendant No.1, for about an hour, in order that his name and residence might be ascertained, and when the same could not be ascertained, the defendant No.2 produced the plaintiff before the nearest Magistrate at Bulandshahr.

3. The defendants deny the allegation in para 3 of the plaint that the plaintiff offered to give his correct name and address to defendant No.2 or to execute a bond for appearance before the Magistrate. The rest of the allegations in para 3 of the plaint are admitted.

4. The damages claimed by the plaintiff are excessive.

No. 49—Defence to a Suit for Moving a Police Officer to make Arrest

(Plaint No.190)

1. The defendant admits the allegation in para 1 of the plaint that he made a report of theft expressing suspicion against the plaintiff but denies that he requested the Sub-Inspector to arrest the plaintiff.

2. The defendant admits the allegations in para 2 of the plaint except the averment regarding request.

Additional Pleas

3. The defendant contends that he had a reasonable and probable cause for believing that the plaintiff had committed theft, and made the said report honestly beleiving on credible information received, that the plaintiff had committed theft of his gold watch.

Particulars of reasonable and probable cause

The plaintiff was a servant of the defendant. The defendant missed his gold watch in the morning of October 14, 1995. The plaintiff was then absent and when the defendant questioned his other servants, Ram Din and Alla Baksh, they told the defendant that they saw the plaintiff in possession of Rs.400 on the night of October 13, and, on being questioned, the plaintiff had told them that he had borrowed the money from one Shanker Lal. The defendant then questioned Shanker Lal who informed the defendant that the plaintiff had pledged a gold watch with him for Rs.400 on the evening of October 13, but had redeemed the same in the morning of October 14. The defendant searched for the plaintiff at the latter's house but could not find him.

No. 50—Defence to a Suit for Libel

(Plaint No.204)

(Admission and Apology)

1. The defendants admit all the allegations of the plaint except damages.

2. The defendants published the said libel without actual malice.

The defendants very much regret that they published the said libel and tender a sincere and unqualified apology to the plaintiff for the same.

3. The defendants have published the said apology at a prominent place in the issue of the "Meerut Herald" for February 10, 1996.

(The defendants may pay into court full costs of the suit and any reasonable amount which they consider proper, and may then add—

4. The defendants pay into court full costs of the plaintiff's suit and Rs.1,000 on account of damages and say that the sum is sufficient to satisfy the plaintiff's claim).

No. 51—Defence of Justification to Suit for Libel

1. The defendant admits all the allegations contained in the plaint except that by the publication of the said words, the plaintiff has been injured in his credit.

2. The words complained of are true in substance and in fact.

No. 52—Defence to a Suit for Malicious Prosecution

(Plaint No.206)

1. The defendant admits that allegations in paras 1 and 2 of the plaint.

2. The defendant denies the allegation in para 3 of the plaint that the charge against the plaintiff was false, or was brought maliciously and without a reasonable probable cause.

3. The charge brought by the defendant against the plaintiff was true.

4. In the alternative, the defendant had a reasonable and probable cause for believing it to be true.

Particulars : The plaintiff used frequently to visit the defendant's house, even in the absence of the defendant. On the date defendant's wife ran away, the plaintiff also left the village. Several residents of the village told the defendant that they had seen the plaintiff going with the defendant's wife from the defendant's village towards the Railway Station and the defendant believed these persons.

5. The special damages claimed in para 4 of the plaint for loss of

business are, even if suffered, not the direct consequence of the plaintiff's prosecution and are too remote in law.

No. 53—Plea Denying that the Defendant was the Prosecutor

(Plaint No.208)

The defendant denies that he prosecuted the plaintiff. The defendant has simply made a report to the police of what he believed to be the true facts and took no further active part in the plaintiff's prosecution.

No. 54—Defence in a Suit for Negligent and Rash Driving

(Plaint No.210)

1. The defendant admits the collision alleged in para 1 of the plaint but denies that it was due to any negligence on the part of the defendant's coachman.

2. The accident was caused by contributory negligence of the coachman of the plaintiff.

Particulars : The plaintiff's driver was, at the time of the accident, drunk and was driving at a very fast speed. When the defendant's coachman turned round the corner and saw the plaintiff's *tonga*, he pulled up the reins of his horses and shouted to the plaintiff's coachman to stop, but the plaintiff's coachman did not listen and did not slacken the speed of his horse, who came running into the defendant's *landau*, causing the accident complained of.

3. The defendant does not admit the injuries to the person of the plaintiff and to his horse and *tonga*, as alleged in para 2 of the plaint.

No. 55—Defence in Suit for Injuries Caused by Negligent Driving

(Plaint No.211)
(*Form No.5, Appendix A, C.P.C.*)

1. The defendant denies that the carriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control

of the defendant's servants. The carriage belonged to _____ of _____ Street, Calcutta livery stable keepers employed by the defendant to supply him with carriages and horses; and the person under whose charge and control the said carriage was, was the servant of the said stable keepers.

2. The defendant does not admit that the said carriage was turned out of Middleton Street negligently, suddenly, or without warning, or at a rapid or dangerous pace.

3. The defendant says the plaintiff might and could, by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and avoided any collision with it.

4. The defendant does not admit the statements contained in the third paragraph of the plaint.

No. 56—Defence in Suits Relating to Nuisances

(Form No. 10, Appendix A, C.P.C.)

1. The plaintiff's rights are not ancient (*or*, deny his other alleged prescriptive rights).

2. The plaintiff's rights will not be materially interfered with by the defendant's buildings.

3. The defendent denies that he or his servants polute the water (*or*, do what is complained of].

[*If the defendant claims the right by prescription or otherwise, to do what is complained of, he must say so, and must state the grounds of the claim, i.e., whether by prescription, grant, or what.*]

4. The plaintiff has been guilty of laches of which the following are particulars :

1870. Plaintiff's mill began to work.

1871. Plaintiff came into possession.

1883. First complaint.

5. As to the plaintiff's claim for damages the defendant will rely on the above grounds of defence, and says that the acts complained of have not produced any damage to the plaintiff. [*If other grounds are relied on, they must be stated, e.g., limitation as to past damages*].

No. 57—Ditto

(Plaint No.217)

1. The defendant admits the allegation in para 1 of the plaint (*or*, the defendant denies that the piece of land to the east of the defendant's house belongs to the plaintiff. The said piece of land belongs to the defendant).

2. The defendant does not admit that the *mori*, the spouts or the door alleged in para 2 of the plaint have been constructed in December last or that the defendant's act in running water through the *mori* or discharging water through the spouts or passing through the door is wrongful.

Additional Pleas

3. The defendant claims (in the alternative) a right of easement to do the acts alleged in para 2 of the plaint, on the said piece of land.

The following are the particulars of the said right :

(i) The defendant has been running the water of his latrine through a *mori*, and has been discharging the rain water of his roof through three water spouts on the said land, for over 20 years before this suit, as of right and without interruption.

(ii) The defendant for over 20 years before this suit, enjoyed, as of right and without interruption, a way on foot from the defendant's house over the said piece of land to the public highway to the east of the said piece of land and back from the said highway over the said piece of land to the defendant's house.

(iii) The eastern wall of the defendant's house had fallen down during the last rains and has been rebuilt by the defendant in the first week of December 1983, and the *mori*, the water spouts and the door have been constructed in the said wall at identically the same place at which they existed in the old wall at the time the said old wall fell down.

No. 58—Defence to a Suit for Seduction

(Plaint No.225)

1. The defendant does not admits that Smt. Ramo was wife of the plaintiff and denies that the defendant knew that she was the plaintiff's wife.

2. The defendant denies the allegation in para 2 of the plaint.

3. The defendant admits that he received Smt. Ramo and has ever since harboured her at his house but denies that he did so wrongfully or that he has detained her or that he refused to deliver her to the plaintiff.

4. The said Smt. Ramo came to the defendant's house of her own accord and asked for protection and shelter, telling a pitiable tale of her sufferings and the defendant gave her protection from motives of pure humanity.

No. 59—Defence to a suit for Slander (General)

1. The defendant did not speak or publish the said words.

2. The said words did not refer to the plaintiff.

3. (The special damage alleged in the plaint is not sufficient in law to sustain the claim).

No. 60—Special Defence to Claim in a Suit for Slander

(Plaint No.226)

1. The defendant admits that he spoke and published the words set out in para 1 of the plaint to Ram Prasad, Bihari Lal and Ram Narain, but denies that he did so to any other person.

2. The said words are true in substance and in fact.

3. Ram Gopal, Amrit Lal and Hafiz Abdul Karim, former patients of the plaintiff who were on intimate terms with the plaintiff, had told the defendant that the plaintiff was a man of immoral character, and the defendant honestly believed the information. On February 8, 1996 the friends of the defendant asked defendant's opinion as to the professional skill and the moral character of the plaintiff, and the defendant spoke and published the words complained of to the said three persons in reply to their questions, in the *bona fide* belief that the said words were true, and without any malice towards the plaintiff. Such publication was, therefore, privileged.

No. 61—Defence to Claim in a Suit for Slander

(Plaint No.230)

1. The defendant admits the allegations in paras 1 and 2 of the plaint.

2. The defendant does not admit that he spoke or published any of the words set out in para 3 of the plaint.

3. The defendant did not mean, and was not understood to mean, what is alleged in para 5 of the plaint. The said words were incapable of conveying the alleged meaning or any other defamatory or actionable meaning.

4. The said words, without the said alleged meaning, are true in substance and fact. The work was very badly done and the defendant broke the contract in many important particulars.

Particulars

(a) *Elgin Road* : The *kankar* used was of an inferior kind. It was not properly metalled. The *kankar* was found loose at several places.

(b)

(c)

5. The chairman of the Buildings and Roads Sub-Committee moved that the plaintiff should be paid the money due to him under the contract. The defendant opposed the motion and made a speech. If, in the course of the speech, he spoke the words alleged in para 3 of the plaint, he did so in the *bona fide* discharge of his duty, as member of the said Sub-Committee, without any malice towards the plaintiff in belief that what he said was true, and the words were published only to the members of the said Sub-Committee who had a corresponding interest and duty in the matter. The occasion was, therefore, privileged.

6. The said words were a fair and *bona fide* comment on matters of public interest, viz. the condition of the roads within the limits of the Allahabad Corporation and the claim of the plaintiff to be paid by the said Corporation for making the said roads.

7. The defendant does not admit that the plaintiff was, in consequence of the said statement, injured in his credit and reputation, and that the Zila

Parishad of Allahabad and the Zila Parishad and Municipal Board of Mirzapur have ceased to employ him as a contractor, in consequence of the above statement or for any other reason.

No. 62—Defence in Suits for Infringement of Trade Mark

(Form No 9, Appendix A, C.P.C.)

1. The alleged trade mark is not the plaintiff's.
2. The alleged trade mark is not a trade mark.
3. The defendant did not infringe.

No. 63—Defence to a Suit for Injury to Animal

(Plaint No.230)

1. The defendant admits the allegations in para 1 of the plaint.

2. The defendant did not intentionally shoot the plaintiff's horse. The horse was shot on account of a pure and inevitable accident, without any negligence on the part of the defendant.

Particulars : (State facts showing how the gun accidentally went off).

No. 64—Defence to a Title Suit for Possession

(Plaint No.235)

1. The defendant denies that the plaintiff is the owner of the house in suit or that he was in possession at any time within 12 years before the suit.

2. The defendant denies that he broke open the lock of the plaintiff's house and entered into possession of the said house on November 5, 1995 or on any other date within 12 years before the suit.

3. The suit is barred by Article 64 Limitation Act, 1963.

No. 65—Defence to a Similar Suit by a Gaon Sabha Against a Person in Possession of a House in the Abadi

1. The defendant admits the allegations in paras 1 and 2 of the plaint.

2. The defendant does not admit that Rameshwar Singh abandoned the house. He really sold the house to the defendant by a registered sale-

deed dated 19th April, 1953 and put the defendant in possession. Since then the defendant has been in possession.

(Or, The defendant does not admit that Rameshwar Singh died heirless and the house escheated to the State. Hanuman Singh is the nephew of Rameshwar Singh being the son of his brother and is his heir at law and in his presence the plaintiff cannot claim any rights in the house.

DEFENCE IN OTHER SUITS

No. 66—Defence in Administration Suit by Pecuniary Legatee

(Form No. 14, Appendix A, C.P.C.)

1. AB's will contained a charge of debts; he died insolvent; he was entitled at his death to some immovable property which the defendant sold and which produced net sum of Rs.____, and the testator had some movable property which the defendant got in, and which produced the net sum of Rs.

2. The defendant applied the whole of the said sums and the sum of Rs._____ which the defendant received from rents of the immovable property to the payment of the funeral and testamentary expenses and some of the debts of the testator.

3. The defendant made up his accounts, and sent a copy thereof to the plaintiff on the___day of_____ 19__, and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendant's offer.

4. The defendant submits that the plaintiff ought to pay the cost of the suit.

No. 67—Defence to a Suit for Setting Aside an Adoption

[*Pleading custom against the ordinary rule of the Hindu Adoptions and Maintenance Act, section 10 (iv)*]

Amongst the (*name caste or sub-caste*) of the Uttar Pradesh there is an immemorial custom, which is reasonable and has been followed without interruption that a widow can adopt a boy aged more than 15 years of age.

No. 68—Defence to a Suit for Possession against a Transferee of a Hindu Widow

(Plaint No.248)

1. The defendant admits the allegations in paras 1 and 3 of the plaint.

2. The defendant admits the pedigree given in para 2 of the plaint so far as it goes, but says that it is incomplete in as much as it does not show the following facts:

(a) Smt. Piari had, after the death of Ramkishan, given birth to a posthumous son Dhani Ram. Dhani Ram married one Smt. Ram Kali.

(b) Har Narain had a third son, Piarey Lal, who had a son, Raj Narain, who had a son, Sri Narain. Sri Narain has left a daughter Smt. Pirano.

3. The defendant does not admit that all persons in the plaintiff's family, nearer to Ramkishan than the plaintiff, had died before Smt. Piari. Sri Narain was alive at the time of Smt. Piari's death and was the nearest reversioner. The plaintiff is not, therefore, the heir of Ramkishan.

4. It is admitted that, on the death of Ramkishan, Smt. Piari entered into possession as widow, but on the birth of Dhani Ram the property vested in him, and on his death, it devolved on Smt. Ram Kali, but, in spite of this Smt. Piari remained all along in adverse possession and has become absolute owner by such possession for over 12 years when she sold it to the defendant.

5. In the alternative, the defendant pleads that the sale was made to pay off the debt of Ramkishan, due on a bond, dated June 4, 1932 to one Tarachand, and was therefore justified.

No. 69—Defence to a Suit for Declaration of the Invalidity of a Widow's Transfer

(Plaint No.249)

1. The defendant No.2 admits the allegations in paras 1 and 2 of the plaint.

2. The defendant No.2 admits that Ramkishan died in 1960, and, on his death, defendant No.1 entered into possession, but not that she

entered into such possession as his widow. The said Ramkishan bequeathed the property in suit, by a will dated August 14,1958, absolutely to defendant No.1, and defendant No.1, entered in possession as aboslute owner under the said will.

3. The defendant No.2 does not admit the pedigree given in para 4 of the plaint and says that the plaintiff is not connected with the family of Ramkishan.

4. In the alternative, the defendant No.2 pleads that Ram Bihari is not colluding with the defendants and that the plaintiff cannot sue in the lifetime of Ram Bihari.

5. The defendant No.2 admits that defendant No.1 has sold the property to him but not that she did so without a legal necessity. The sale was made to pay off government revenue due from her husband for the year 1959 and to pay the expenses of a pilgrimage to Gaya for the benefit of the soul of the said Ramkishan.

No. 70—Defence to a Suit for Setting Aside a Father's Alienation

(Plaint No.251)

1. The defendant admits the allegations in paras 1 and 3 of the plaint.

2. The defendant denies that the property was the joint family property in which the plaintiff had any interest. It was the self-acquired property of the defendant No.2.

3. The defendant denies that the mortgage was made without a legal necessity or that there was no necessity for the rate of interest stipulated.

4. The Mortgage was made to meet the expenses of the marriage of Satyavati, daughter of defendant No.2.

(*Or*, the defendant No.2 owed a debt to one Chand Prasad under a bond, dated June 4, 1978, and the mortgage was made to pay off the said debt).

(*Or*, the defendant denies that the antecedent debt was incurred for the purposes of gambling).

(*Or*, the defendant had, before advancing money to defendant

No. 2, made proper and *bona fide* inquiries as to the existence of the aforesaid necessity and did all that was reasonable to satisfy himself as to existence of such necessity).

5. The rate of interest stipulated in the mortgage-deed is what was, at the time, generally prevalent in the market (*or*, was, at the time and under the circumstances a fair and reasonable one).

6. The plaintiff had not been born when the said mortgage was made, and the only other members of the family of the defendant No.2 at the said time were the plaintiff's uncles and elder brother, and the mortgage was made with the consent of the said uncles and brothers.

No. 71—Defence to a Suit for Recovery of Family Property Sold in Execution of a Decree against the Father

(Plaint No.252)

1-2. Same as in the previous precedent.

3. The defendant denies that the defendant No.2 had any *badhni* transaction with defendant No.1 or made the mortgage to pay off any debts incurred in such transaction or to raise money for drinking. (*Or*, the defendant denies that defendant No.2 maintained a mistress Smt. Putli or any other mistress, or that he made the said mortgage to pay off debts incurred for the purpose of maintaining any such mistress.)

No. 72—Defence to a Wife's Suit for Maintenance

(Plaint No.255)

1. The defendant admits that plaintiff is his wife.

2. The defendant denies that he took a mistress and further denies each and every one of the other allegations of cruelty to the plaintiff made in para 2 of the plaint.

3. The plaintiff was leading an unchaste life, and when the defendant remonstrated her, she voluntarily and without the consent or permission of the defendant, left the defendant's house and has since, without any lawful excuse, refused to return to the defendant's house. She cannot, therefore, claim maintenance.

4. The plaintiff is still leading an unchaste life.

Particulars of Unchastity

The plaintiff has an immoral connection with one Ram Prasad. She has given birth to an illegitimate son begotten of the said unlawful connection.

5. The defendant admits the allegation in para 3 of the plaint that income of the defendant's property is Rs. 4,900 per mensem but says that he is heavily indebted, and under the circumstances, cannot afford more than Rs.250 a month for plaintiff's separate maintenance.

No. 73—Defence to a Suit for Restitution of Conjugal Rights

(Plaint No.261)

1. The defendant admits that she is the wife of the plaintiff.

2. The defendant admits that she refuses to go to the plaintiff's house but does not admit that she does so without any lawful excuse.

3. The defendant left the plaintiff on account of the plaintiff's cruelty, and she fears that her life would be in danger if she returns to the plaintiff.

Particulars : The plaintiff leads an immoral life, keeps a prostitute and is addicted to drinking. He is constantly in need of money for his immoral purposes. When the defendant was living with him, the plaintiff used to press her to pay him money or to give him her jewellery, and when she refused to comply, he used to beat her, and to confine her in a room without giving her food for several days and nights. On October 14, 1994, the day before she finally left the plaintiff, the plaintiff asked her to execute a deed of gift in his favour in respect of the property which she had received from her father, and on the defendant refusing to do so, the plaintiff beat her and threatened to kill her, and would have killed her had she not run away to her parents' house.

No. 74—Defence to a Suit for Partition

(Plaint No.264)

1. The defendant admits the pedigree given in the plaint, but does not admit that the parties are members of a joint Hindu family.

2. By a private partition, made verbally in the month of April 1982, between the defendant and Ram Sundar, father of the plaintiff, the whole family property had been partitioned and the parties have since been in separate possession of their shares.

3. In the alternative, the defendant claims to be allotted in his share, at the partition, the houses specified below, which have been in his possession since 1982.

4. The defendant has spent Rs.44,000 in building the second storey of house No.1 and in rebuilding the whole of the house No.2.

5. Items.....are the separate properties of this defendant and are not part of the joint family properties, as they were purchased by this defendant from his separate earnings as a Deputy Collector.

6. The plaintiff has left out from his claim 2 shops situate at Khatauli which also belonged to the ancestors of the parties. The suit for partial partition is not maintainable.

No. 75—Ditto

1. The defendants Nos.2 and 3 admit all the allegations in the plaint.

2. Item 1 of the properties detailed in the plaint is a dwelling house. The answering defendants undertake to buy the 1/3rd share of the plaintiff and pray that the same be valued and directed to be sold to them and all necessary and proper directions be given in that belhalf.

No. 76—Defence to a Suit for Declaration of Title

(Plaint No.268)

1. The defendant denies that the plaintiff is owner of the property in suit.

2. The defendant denies that the plaintiff is in possession of the said property. The defendant is in possession and the plaintiff's suit for a mere declaration is not, therefore, maintainable.

No. 77—Defence to a Suit for Pre-emption under Mohammedan Law

(Plaint No.271)

1. The defendant admits the sale of the property in suit by Rasula to

the defendant but denies that the real consideration was Rs.30,000. He asserts that Rs.40,000 was the real consideration.

2. The defendant admits that the plaintiff is a *Shafi-i-sharik*, but denies that the defendant has no superior right. The defendant has a right of way through *sehan* land appertaining to the latter house, and is therefore a *Shafi-i-khalit* also.

3. The defendant does not admit that, immediately on hearing of the sale, the plaintiff declared his intention to assert a right of pre-emption.

4. The defendant denies that the plaintiff made the *talab-i-ishtishad* in the presence of the defendant, or at all.

No. 78—Defence to Minor's Suit for Setting Aside a Decree

(Plaint No.275)

1. The defendant admits the allegations in paras 1, 3, 4 and 7 of the plaint.

2. The defendant does not admit the allegation in paras 2 and 5 of the plaint.

3. The defendant denies that Smt. Ram Dei was blind or deaf at the time of the defendant's rent suit, or was incapable of defending the suit on behalf of the plaintiff.

4. The defendant denies that the rent for the suit period had been paid up. The rent was in arrears and had not been paid before the said suit or at all. The plaintiff had no defence to the defendant's said suit for arrears of rent and has not been prejudiced in any way.

APPEALS*

No 1—Form of Heading of Appeal from a Decree on Original Side (Calcutta)

IN THE HIGH COURT OF JUDICATURE AT FORT WILLIAM CALCUTTA

In appeal from its original civil jurisdiction

Appeal No.....

Suit No.....19

(insert name).....Appellant and (plaintiff) or (defendant)

versus

(insert name).....Respondent and (defendant) or (plaintiff)

The appellant, named above, appeals against the (decree) or order of the Honourable Mr. Justice.....in the above suit passed on the.....day of.....19..... , for the following amongst other reasons.....

(1), (2), (3), etc. (here state grounds of appeal).

Appeal No.....(*By way of endorsement*).

Suit No.....of 19.....

.....Appellant.

versus

.....Respondent

**Forum* : So far as appeals from decrees in cases on original side of High Courts of Bombay, Madras and Calcutta are concerned, provision is made in their Letters Patent and Rules framed by them. Ordinarily an original suit is tried by a single judge and appeals against decrees therein lie to a Division Bench. This also applies to the Delhi High Court. For areas to which the Bengal, Agra and Assam Civil Court Act (XII of 1887) is applicable, the lowest court of civil jurisdiction is the court of the Civil Judge (Junior Division). Appeals from decrees passed by them lie to the District Judge but can be transferred by him for disposal to an Additional District Judge or Civil Judge (Senior Division) under him. From all decrees passed by District or Additonal District Judges appeals lie only to the High Court. From the

No. 2—Ditto (Madras)

IN THE HIGH COURT OF JUDICATURE AT MADRAS
APPELLATE JURISDICTION

Appeal No.....of 19.....

Between

1. AB and

2. CD.....appellants

And

1. EF and

2. GH.....respondents

On appeal from the judgment of the Honourable Mr. Justice..... dated the.....day of .....in the ordinary original civil (*or*, matrimonial, *or* admiralty) jurisdiction of this Court.

Suit No.....of 19.....

(*Or*, Original Petition No.....of 19.....)

Between

1. AB and

2. CD.....plaintiffs

And

1. EF and

2. GH.....defendants

Appellate decrees of Civil Judges, Additional District Judges or District Judges, second appeals lie to the High Court. Some Acts create courts of special jurisdiction and provision is made in them for filing of suits or petitions under the Act in specified courts, e.g., the Hindu Marriage Act, the Land Acquisition Act. The appeals against decrees passed by such courts lie to courts as provided for in those Acts. Since the definition of decree has been amended by the Amending Act of 1976, by deletion of the words 'section 47 or', any order passed under section 47 would not be treated as a decree and neither a first nor a second appeal would lie in respect of such an order (*Mohan Das* v. *Kamla Devi*, A 1978 Raj 127 DB).

Besides decrees, appeals lie against some orders of the civil courts also as

No. 3—Memorandum of Appeal from a Decree

IN THE COURT OF THE DISTRICT JUDGE, ALLAHABAD

... ... *Plaintiff-Appellant*

versus

... ... *Defendant-Respondent*

First Appeal No. of 1996

The above-named appellant appeals to the court of the District Judge at Allahabad, from the decree of Sri Shanti Narain, Civil Judge (Junior Division) at Allahabad in suit No.550 of 1992, dated the 4th day of November, 1992, dismissing the appellant's suit, and sets forth the following amongst other.

Grounds of Appeal

1. Because the finding that the payment of Rs.1,000 was not made on account of interest as such, is against the weight of evidence on the record and is incorrect.

2. Because the lower court erred in holding that the thumb mark of illiterate payer under an endorsement of payment is not a sufficient compliance with the requirements of section 19 of the Limitation Act.

3. Because the respondent's evidence of the alleged satisfaction of the bond is partial and unreliable, and should not have been believed.

4. Because there is no evidence on the record to support the finding that the interest clause was entered in the bond under undue influence.

5. Because the lower court did not act rightly in rejecting the appellant's application for permission to file certain documentary evidence (*particulars to be given*)on the date of hearing.

Value of Appeal : Rs.5,250.

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mentioned in O.43, R.1. Such appeals lie to court to which the decree passed by those courts would be appealable. No second appeals lie against decrees passed in appeal in such cases.

Court Fees : Appeals are included in the word "suit" for purposes of Court

Relief : To set aside the decree of the lower court and to decree the plaintiff's claim with costs in both the courts.

(Sd.) M. AHMAD

Advocate for the Apellant

No. 4—Memorandum of Appeal from an Order

The above-named appellant appeals to the court of the District Judge of Muzaffarnagar, from an order of Shri Rup Narayan, Civil Judge (Junior Division) at Muzaffarnagar, dated November 4, 1995, refusing to set aside the *ex parte* decree passed in suit No.502 of 1995, and sets forth the following amongst other—

Grounds of Appeal

1. Because the lower court erred in holding that the service of summons on the appellant was sufficient in law.

2. Because the lower court erred in disbelieving the appellant's evidence that he did not know of the suit before December 1, 1995.

Value of the Appeal : Rs.2,000

Relief : To reverse the order appealed from and to set aside the *ex parte* decree against the appellant.

The limitation for this appeal expired on.....which was a holiday. The appeal is, therefore, filed today, the next opening day.

(Sd.) A.C. BANERJI

Advocate for the Appellant

No. 5—Memorandum of Appeal from an Appellate Decree

The above-named appellant appeals to the Honourable High Court at Allahabad against the appellate decree of Shri A. Ashdown, Distirct Judge (Junior Division) at Meerut, dated July 14, 1995, confirming a decree of Shri Brindaban, Civil Judge at Meerut, in suit No.212 of 1992, dated

Fees Act (section 2, clause IV). Ordinarily the same court fee is payable in appeal as would be payable in a suit claiming the relief prayed for in the appeals.

Limitation : for appeals under C.P.C. is 90 days from the date of the decree or order, if the appeal is to the High Court and 30 days if to any other court

January 15, 1993, dismissing the appellant's suit, and sets forth the following amongst other—

Grounds of Appeal

1. Because there is no evidence on the record to support the finding of the courts below that the respondent had denied the plaintiff's title more than 12 years ago or at any time.

2. Because the lower appellate court has erred in law in holding that the onus of proving his possession within 12 years lay upon the appellant.

3. Because the lower appellate court erred in law in holding that section 11, C.P.C. barred the suit.

Value of the Appeal : Rs.5,250

Relief : That the Honourable Court will be pleased to set aside the decrees of the court below, and to decree the plaintiff's claim with costs.

(Sd.) F. CUMMING

Advocate for the Appellant

I certify that I have examined the record and that in my opinion ground of appeal No.1 is well founded in fact.

(Sd.) F.CUMMING

No. 6—Cross-Objection under O. 41, R. 22, C.P.C.*

IN THE COURT OF THE DISTRICT JUDGE AT AGRA

Ram Chandra ... ... *Plaintiff-Appellant*

versus

Kishori Lal ... ... *Defendant-Respondent*

The above-named respondent files this cross-objection against a

(Article 116). If the appeal is from the decree or order of the High Court to the same court, the period is 30 days from the date of the decree or order. For leave to appeal as a pauper, Article 113 provides that if the application is made to the High Court, the period is 60 days and if to any other court, it is 30 days.

For appeals from decrees or orders passed by courts of special jurisdiction the period of limitation is usually provided in the Act creating those courts.

*See Ch XVI.

part of the decree appealed from in this case and sets forth the following grounds of objection to the said part of the decree, viz. :

1. It is proved from the evidence on the record that the value of the 4 trees cut away by the respondent was only Rs.450, and the lower court erred in holding that it was Rs.1060.

2. The lower court has erred in law in allowing interest to the plaintiff on the value of the trees from the date of cutting to that of the suit.

Relief: That the amount of the decree be reduced to Rs.450.

REVISION[1]

Application for Revision (section 115 C.P.C.)

Petition of revision under section 115, C.P.C. against the decree of the District Judge of Varanasi dated 15th December, 1995, reversing the decree of the Civil Judge (Junior Division) of Varanasi dated the 25th July, 1995, passed in suit No.315 of 1995 valued at Rs.1,950.

Respectfully Showeth—

1. That the applicant was the plaintiff in the aforesaid suit which had been brought under section 6 of the Specific Relief Act.

2. That the suit was decreed by the Civil Judge (Junior Division) but the District Judge on appeal has reversed the Civil Judge's (Junior Devision) decree.

3. That under the law no appeal lay to the District Judge from the Civil Judge's (Junior Division) decree and the District Judge, therefore, exercised a jurisdiction which was not vested in him by law.

The applicant, therefore, prays that this Hon'ble Court will call for the record of the case and set aside the said decree of the District Judge and restore that of the Civil Judge (Junior Division) and award him cost in all courts.

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[1]Revision lies only on one of the three grounds mentioned in section 115 and only when no appeal lies, see *S. Venkatagiri Ayyangar* v. *The Hindu Religious Endowments Board, Madras*, A 1949 PC 156; *Jaychand Lal* v. *Kamala Kishan Chaudhry*, A 1949 PC 239; *Namita Dhar* v. *Dr. Amalendu Sen*, A 1977 Cal 187. In *Keshavdas Chamria* v. *Radhakissen Chamria*, A 1953 SC 23, the Supreme Court laid down that only errors relating to jurisdiction fall within the scope of section 115, which is concerned not so much with the decision itself as with the manner of arriving at it. In *Chaube Jagdish Pd.* v. *Ganga Pd.*, A 1959 SC 492, the court observed that where there are jurisdictional facts, the High Court can in exercise of its revisional powers, consider whether those facts were correctly decided. Revision does not lie from all interlocutory orders unless by that order a case is decided. "Case" is used in a very wide sense and is not confined to a suit or appeal only. It includes Civil Proceedings and parts thereof including decision of an issue (*Maj. S.S. Khanna* v. *Brig. F.J.Dillon*, 1963 ALJ 1068). Errors of fact cannot be corrected in revision and those of law only if they can be related to the Court's jurisdiction to try the suit (*Pandurang* v. *Maruti*, A 1966 SC 153; *D.L.F. Housing and Construction Pvt. Ltd.* v. *Swarup Singh*, A 1971 SC 2324). When a court

MISCELLANEOUS APPLICATIONS UNDER C.P.C.

No. 1—Objection about Compensatory Costs under section 35 A, C.P.C. (a)

(By defendant)

To the written statement, add, as the last paragraph— "The plaintiff's claim is false (*or*, vexatious), (*or*, is false and vexatious) to the knowledge of the plaintiff and the defendant, therefore, claims special costs by way of compensation."

No. 2—Ditto

(By plaintiff)

"The plaintiff begs to submit that the defence of payment put forward by the defendant is false and vexatious to the knowledge of the said defendant and, therefore, claims special costs by way of compensation."

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dismisses a suit for default due to a mistake of the court and on the same day recalls the order, the subsequent order does not suffer from lack of jurisdiction and no revision would lie (*Devi Dayal Textile Co.* v. *Nand Lal*, A 1977 Delhi 7). When the court sets aside an *ex parte* decree on condition of deposit of 2 lacs, revision can be filed against the order (*Raj Kumar* v. *Mohan Meakin Breweries Ltd.*, A 1979 All 370). An order setting aside an award amounts to a case decided (*Shambhu Dayal* v. *Basudeo Prasad*, A 1970 All 525 FB). Scope of expression "any case which has been decided" has become wider on account of the explanation added by Amendment of 1976 and court may interfere to secure the ends of justice (*Nagendra Nath Roy* v. *Ram Prasad Panda*, (1979) 1 Cut WR 159; *Sobha* v. *Bihari Lal*, A 1981 HP 18). An order, to amount to a case decided, need not decide the suit as a whole but must decide a vital matter in controversy (*Mohinder Nath* v. *Sandhran Rani*, A 1981 J &K 49). A revision against an interlocutory order would not lie unless such order, if it had been made in favour of the plaintiff, would have disposed of the suit or proceeding or unless the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the applicant (*Dohai Dei* v. *Rama Rauta*, A 1985 Ori 77).

(a) Section 35 A, C.P.C. empowers courts to allow special costs by way of compensation (*T. Arivandandam* v. *T.V.Satyapal*, A 1977 SC 2421). Such costs can be awarded even against the next friend of a minor (*Rajkumar* v. *Mangad Rai*, 1930 ALJ 1295), but cannot be allowed in revision (*Cohen* v. *Sirdar Sahib Iqbal Singh*, 42 CWN 658). Special costs may be awarded where a party has suppressed material

No. 3—Application for Transfer of Decree for Execution (section 39) *(b)*

1. The applicant is the holder of the decree passed by this court in suit No.293 of 1995.

2. The opposite party, against whom the said decree has been passed, actually and voluntarily resides (*or*, carried on business) (*or*, personally works for gain) at Jhajjar within the jurisdiction of the court of the Civil Judge (Senior Division) of Rohtak.

(*Or*, The opposite party against whom the said decree has been passed, has no property within the jurisdiction of this court and has property within the jurisdiction of the court of the Civil Judge (Senior Division) of Rohtak).

(*Or*, The said decree directs sale of property situate outside the jurisdiction of this court and within the jurisdiction of the court of the Civil Judge (Senior Division) of Rohtak).

(*Or*, The property of the judgment-debtor to the said decree has been attached and put to sale by the Civil Judge (Senior Divison) of Meerut in execution of his decree No.421 of 1993 and the applicant wishes to claim rateable distribution of the the sale-proceeds to be realised by the said execution sale by the Civil Judge (Senior Division) of Meerut).

The applicant, therefore, prays that his said decree be sent for execution to the court of the District Judge, Rohtak (*or*, to the court of the Civil Judge, (Senior Division) Meerut).

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facts (*Paras Nath Jaiswal* v. *State of AP*, A 1994 AP 68 DB).

(b) The practice of making such an application in the form of an execution application has no justification. The ground on which the transfer is sought (being one of those mentioned in section 39) should be mentioned, and the prayer should mention the name of the court to which decree has to be sent.

No. 4—Judgment Debtor's Objection under section 47 C.P.C.(c)

(Legal representative of the judgment-debtor) Objector

versus

(... ... ... Decree-holder) Opposite Party

Objection under Sec.47, C.P.C.

The objector begs to raise the following objections to the execution application :

1. That the former execution application, from the date of which the present application is the claimed to be within time, was not *bona fide* and was made simply for the purpose of limitation. The present execution application is, therefore, barred by limitation.

2. That the further interest claimed by the decree-holder has not been allowed by the decree.

(c) All objections by one who is a party to the decree must be filed under this section and no separate suit is maintainable. A party against whom a suit has been dismissed but whose name is retained is also a party (*Chhotelal* v. *Bhagwan Das*, A 1933 Nag 246), but one against whom a suit is given up or dismissed or who is exonerated by the plaintiff on the ground that he was wrongly joined is not a party (*U. Kala* v. *Ma Hnin*, 101 IC 749, 5 R 110; *Jujbishta Pande* v. *Lakshmana*, 143 IC 476, A 1933 Mad 435, 1933 MWN 527; *Parandhamayya* v. *Veerayya*, 1938 MWN 1252; *Kailasa Reddiar* v. *Ponnammal*, (1961) 2 MLJ 119; *Rajendra Prasad Sinha* v. *Karam Chand Thapar & Co.*, A 1975 Pat 265). A transferee of the decree-holder is decree-holder's representative (*Fakir Baksh* v. *Mt. Marian*, 168 IC 154, A 1937 Oudh 365) and so a purchaser of mortgaged property, pending suit on the mortgage, is judgment-debtor's representative (*Lakshmi Narain* v. *Hanumayya*, 171 IC 925, A 1937 Mad 580; *Prameshri Din* v. *Ram Charan*, 169 IC 657, 41 CWN 1130, 1937 AWR 834, A 1937 PC 260), and so also a transferee of the mortgagor after the mortgage decree (*Rashbehari* v. *Mahindi Pal*, 41 CWN 1162, A 1937 Cal 565), also a transferee of attached property *pendente lite* (*Annamalai Mudalir* v. *Kuppusami*, (1962) 2 MLJ 336), but a receiver of judgment-debtor's estate is not (*Ghanshamdas* v. *Shivaldas*, 30 SLR 288). A person sued in a representative capacity is a party even for the purpose of raising a claim in his personal capacity (*R.M.S.V. Chattyar* v. *Nayaing*, A 1940 Rang 27) and *vice versa* (*Shabaan* v. *Hemraj*, ILR 1941 Kar 474). *Inter se* dispute between co-decree holders is foreign to the scope of section 47 C.P.C. (*Bans Raj Singh* v. *Krishna Chandra*, (1981) 7 ALR 435).

Such an objection cannot be dismissed summarily on the ground of delay (*Musharfi* v. *Md. Mustaiabdullah*, 111 IC 837, A 1929 Oudh 1). An auction pur-

3. That a portion of the property attached, viz., *grove* No.16 in village Badam, is personal property of the objector and not that of Sohanlal, judgment-debtor. The said property should be released from attachment.

4. That the rest of the property belonged to the joint Hindu family composed of the objector and his deceased father, the judgment-debtor, and is not liable to be attached in execution of his decree, because the debt for which the decree was passed was contracted by the said father in order to pay off losses incurred in *badhni* or grain gambling transactions made by him with the decree-holder in June 1992.

The objector, therefore, prays that the above objections be allowed.

No. 5—Application under section 95, C.P.C. *(d)*

1. The plaintiff applied for, and obtained, an order for attachment before judgment of the property of the defendant applicant, in suit No.1370 of 1995, on December 20, 1995, and movable property of the applicant

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chaser is a party to the suit within the meaning of section 47 in respect of the property purchased by him.

When after a final decree was passed in a partition suit, defendants interfered with plaintiff's possession over allotted portion. Plaintiff filed suit for injunction against defendants for restraining them from interfering with possession and in the alternative for possession. It was held that such suit is not barred by section 47 C.P.C. as subsequent acts of defendants gave rise to fresh cause of action (*Ram Lakhan Tiwari* v. *Ram Samujh Tiwari*, A 1981 All 211). A mere formal defect in an execution application is curable and not necessarily fatal (*Farukh* v. *District Judge*, A 1984 All 393).

The detemination of any question falling within Sec. 47 is no longer a decree and hence appeal and second appeal do not lie against such determination (*Narmada* v. *Ram Nandan*, A 1987 Pat 33). The mere omission to mention Sec. 47 does not take out the objection from the ambit of section 47 (*S.V. Kankaraj* v. *Vijay Bank*, A 1987 Kant 252).

A decree which is a nullity, can be challenged even in execution proceedings (*Jaipur Development Authority* v. *Radhey Shyam*, (1994) 4 SCC 370). The pre-sale illegalities or irregularites committed in execution proceedings can be challenged by way of objection under Sec. 47 (*Desh Bnadhu Gupta* v. *N.L.Anand*, (1994) 1 SCC 131). Unless the decree is nullity, the executing Court cannot go behind the decree and is bound to execute the decree (*Hiralal Mool Chand* v. *Barot Raman Lal Ranchhoddas*, A 1993 SC 1449).

(d) An application can be made under this section even without first getting the order of attachment set aside, nor is an order making the conditional attachment absolute, a bar to such application (*Palanisami* v. *Kaliappa*, 1939 MWN 1084,

was attached, under the said order on December 26, 1995.

2. The said application was made on insufficient grounds. The allegation in the application that the applicant was going to dispose of the said property and that he had no other property were false.

3. The applicant had no intention of disposing of the said property and he had, and still has, a large property of the value of Rs.10,000.

(*Or, substitute the following for Nos.2 and 3.*)

2. The said suit has been dismissed by the court on March 14, 1996, on the ground that the bond on which it was based was a forgery.

3. The bond was a forgery and the plaintiff had no reasonable or probable ground for instituting the suit.

The applicant prays that Rs.1,000 may be awarded to him as compensation for the injury caused to him by the said attachment.

No.6—Application under sec. 144, C.P.C. *(e)*

1. On October 20, 1993, the opposite party obtained from this court a decree (being decree No.269 of 1993) against the applicant for possession of the house specified in schedule A annexed to this application, moveable property mentioned in Schedule B, and cattle detailed in Schedule C, for mesne profits and for costs of the suit.

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50 LW 640, A 1940 Mad 77). It should be proved that the attachment was applied for on insufficient grounds. It is not necessary to prove special damage. General damage can also be awarded (*Palanisami* v. *Kaliappa*, supra). The mere passing of an order without actual attachment does not furnish any cause of action (*Mohammad Ismail & Co.* v. *Ashghra & Co.*, 183 IC 174, A 1939 Rang 260). But actual damages, if proved, as well as general damages can be awarded (*Palanisami* v. *Kaliappa*, supra; *Rehmanbux* v. *Dhallo Mal*, A 1963 Raj 177). Application does not lie against the next friend of a minor plaintiff though a separate suit will lie against him for damages (*Satayanarayan* v. *Anjareddi*, A 1941 Mad 779). The remedy provided by section 95 is a special remedy. The person who makes the application cannot institute a suit for the same purpose. But a person who does not make an application can institute a suit for damages (*Basamma* v. *Peerappa*, (1981) 1 Karn LJ 286, A 1982 Karn 9).

(e) The court has, under this section, power to restore the parties to their original position, therfore, it can allow mesne profits also (*Tagore* v. *Mathurakant*, 173 IC 391, A 1937 Cal 478). It has been held that even an uncertified payment made to decree-holder outside the court can be recovered under section 144 (*Hanumanthappa* v. *Goolappa*, 48 LW 945). The application is one for execution

2. By execution of the said decree, the opposite party obtained possession of the said house on May 15, 1995, and of the said moveable property and the said cattle on June 20, 1995.

3. On February 25, 1996, the applicant deposited in court Rs.5,261 on account of mesne profits and Rs.2,565 on account of costs as directed by the said decree.

4. The said decree of this court was, on March 10, 1996, set side by the Hon'ble High Court at Patna in First Appeal No.351 of 1995.

5. The applicant claims by way of restitution-

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and is governed by the same rule of limitation (Article 137). Limitation willl be reckoned from the date of reversal of the decree. The time spent in preferring an unsuccessful second appeal will not be excluded(*Harimohan* v. *Parmeshwar*, 32 CWN 971). Appeal from an order under this section requires *ad valorem* court-fee. Interest is allowed on money refunded under this section (*Hanuman* v. *National Bank*, 7 L 232, 93 IC 954; *Surajmal* v. *Baniram*, A 1941 Nag 195; *Dalaram* v. *Ramanand*, A 1929 Pat 493; *Lucy Kochurvaree* v. *P.Mariappa Gounder*, A 1979 SC 1214). Resitutuion can be allowed not only when decree is reversed in appeal but also when it is reversed on review (*Tangatur Subbarayandu* v. *Yerraam*, 40 M 299: contra, *L.N. Banarji* v. *K.L.& S.Co.*, A 1941 PC 128; *Ashutosh* v. *Kundal*, 125 IC 645, 33 CWN 908, A 1929 Cal 814, 57 C 226 DB; *Chintamani* v. *Chunnil Sahu*, 1 PLJ 43, 34 IC 747; *Sarnalata Dasi* v. *R. Rathmanamal*, (1979) 2 MLJ 449). An application under this section can be made not only by the party on whose apeal the decree is reversed but also by any other party who is benefited by the decision in appeal (*Dhani Ram* v. *Sumer Chand*, 98 IC 1042, A 1927 All 182 DB; *Gurnath* v. *Venkatesh*, 168 IC 629, A 1937 Bom 101). It can be made by a transferee of the appellate decree (*Jamini* v. *Dharamdas*, 33 C 857), or against an attaching creditor of the decree varied (*Mangal Singh* v. *Jagat Ram*, A 1944 Pesh 44), but where surety is entitled, principal cannot apply (*Bai Krishan* v. *All Rasul*, 1938 AMWJ 127). There are conflicting decisions on whether restitution can be claimed even if possession was obtained, otherwise than by execution but under colour of the decree *(Yes; Suryadatta*, v. *Jamanadattt*, 18 ALJ 729, 42 C 568, 57 IC 148; *Narain Singh* v. *Bachu Singh*, 6 ALJ 551,99 IC 952; contra *Brij Mohan* v. *Rameshar* 183 IC 709, A 1939 Oudh 273 DB). Where the judgment-debtor to a decree for specific performance handed over the property to the decree-holder, he was held to be entitled to recover it under section 144 if the decree is set aside in appeal (*R.H.Shinner* v. *Lt. J.R.R Skinner*, A 1943 All 202).

The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case does not strictly fall within the ambit of section 144. (*Kavita Trehan* v. *Balsara Hygiene Products Ltd.*, 1994 A SCW 466 A 1995 SC 441:

(a) Possession of the house mentioned in Schedule A.

(b) Rs.____on account of the mesne profits of the said house as per account given in Schedule D annexed to this application.

(c) Recovery of the moveable property and cattle mentioned in Schedule B and C respectively or their value Rs.4,262 as detailed in the said schedule.

(d) Rs._____on account of damages for being deprived of the use of the said movables and cattle as per account given in Schedule E attached to this application.

(e) Refund of Rs.7,826, with interest at 6 per cent per annum from February 25, 1996 to the date of realisation.

Birendra v. *Surendra*, A 1940 Cal 260, 149 IC 581; *Ramanathan Chettiar* v. *V.R.Rathmnamal*, (1974) 2 MLJ 449; *Sahebgonda* v. *Sonubai*, (1981) 1 Kam LJ 151). Section 144 is not exhaustive but only enumeration and therefore, if there are cases where section 144 is not attracted, the principle can be borrowed and made applicable in the interest of justice (*Rakesh Singhal* v. *Vth Addl Distt and Sessions Judge*, A 1990 All 12). The Court of "first instance" in section 144 competent to execute the decree is the Court which passed the decree, the transferee Court is not competent to entertain application for restitution. (*Neelathupara* v. *Montharappalla*, A 1994 SC 1591). Restitution against the auction-purchaser *see-Chinnamal* v. *P. Arumugham*, A 1990 SC 1828).

Restitution must be granted if the decree is reversed. Right to retain possession (taken in execution) under another title arising during pendency of the litigation is no defence to an application under section 144 (*Chandra Krishna* v. *Radha Krishna*, 108 IC 111, 5 OWN 91; also see, *Binayak* v. *Ramesh Chandra*, A 1966 SC 948; *Khemchand Sharma* v. *Padmalochan Panda*, 1973 (1) CWR 530). Restitution is sometimes granted under the inherent power of the court even if the case does not fall under section 144 e.g., when decree is varied by compromise (*Sundarsana* v. *Gopala*, 1933 MWN 641; *Beni Prasad* v. *Kundanlal*, 150 IC 224, A 1934 Lah 322; *Sufal* v. *Surendra*, 60 CLJ 44; *Raghubanslal* v. *Solano*, 149 IC 365, A 1934 Pat 150; contra, *Mustaddi* v. *Sultan*, 1933 ALJ 724, A 1933 All 745) or where a decree was shown to be a nullity as it was passed against a dead person (*Rama* v. *Narasimhalu*, 146 IC 564, A 1933 Mad 888, [1]), or where the sale in execution of decree against father is set aside in a separate suit by the sons (*Jogendranath* v. *Hira Sahu*, A 1948 All 252, 1948 ALJ 25), or when the decree is set aside in a separate suit by a court of Subordinate jurisdiction (*Maqbool Alam* v. *Mt. Khodaijia*, A 1949 Pat 133; *Sarnalata Dasi* v. *Monimohan Modak*, (1971) 75 CWN 927), or where defendant has paid money due on account of court-fee in a pauper suit under an order of the court which was reversed (*Mahalakshma* v. *Ramayya*, 168 IC 717, A 1937 Mad 178). Where a decree is not binding on the plaintiff, he is entitled to the

No. 7—Application for Amendment of Plaint, Judgment and Decree (Secs. 151 and 152) *(f)*

1. The applicant instituted a suit No.293 of 1984 in this court for sale of certain mortgaged property.

2. The said property was described in the mortgage bond as plots Nos.476 and 477.

3. After the mortgage, the number of plots were altered at the settlement of 1985 and the corresponding numbers of the mortgaged-plots are 320 and 321 respectively.

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restitution of his property sold in the execution of the decree (*Bhanwar Lal* v. *Prem Lata*, A 1990 SC 623).

In an application under section 144 for possession and mesne profits, the deductions claimed by the court auction purchaser on account of payment of *kist* for agricultural lands, house-tax, and the amount paid in discharge of the mortgage on the suit property were allowed, but deductions for improvements and getting tap connections were disallowed (*Rattiram Pillai* v. *Gnanabaraman Pillai*, (1980) 1 MLJ 181).

The bar of suit under section 144 (2), C.P.C. applies to cases to which section 144 applies and not to cases of restitution under the inherent powers of the court (*Jokhu Mal* v. *Sudama Mal*, A 1955 All 526).

(f) A broad view must be taken of the provisions of sectons 151 and 152 as the object of procedural laws is to do justice between the parties. Hence when there are mistakes which are capable of being rectified and are covered by section 152, courts must rectify the mistakes (*Delta Products (P) Ltd.* v. *Industrial Credit and Investment Corp. of India*, 1980 Mah LJ 156). The Court is competent to correct clerical or arithmetical mistakes or accidental slip or omission at any time in the judgment, decree or orders passed by it, it is not necessary to require a party to file appeal or review (*B. Shivananda* v. *Andhra Bank Ltd.*, (1994) 4 SCC 368). Such clerical or arithmatical errors or accidental mistakes can be corrected at any time as there is no limitation (*Mt. Shanti* v. *Mulkh Raj*, A 1937 Lah 894; *Bawa Singh* v. *Babu Singh*, A 1979 Punjab 94). But inordinate delay may be a ground for rejecting an application for correction of the amount payable under a decree (*Nagendra* v. *Ambica*, 33 CWN 959, 50 CLJ 12, A 1929 Cal 676 DB). Decree-holder's acceptance of payment of decretal amount is no bar to an application for amendment (*Munuswamy* v. *Jagannatha*, A 1929 Mad 830, 1929 MLW 720). Such amendment can be made by the court under its inherent powers (vide section 151) even if section 152 does not apply, not only in the decree but in any other proceeding also. The error can be amended throughout the record (Sheo Balak v. Sukhdeo, 12 ALJ 285, 23 IC 344). Even consent orders can be rectified (*Karimunnissa Begum* v. *Kair Mir Jalaluddin Valde Mir Masum Ali Khan*, ILR 1937 Bom 837, 10 RB 252, 39 BLR 915, A 1937 Bom

4. By an accidental mistake the plaintiff copied out the description of the property to be sold from the mortgage deed and did not specify the new numbers in the plaint, and in the judgment and in the preliminary and final decrees the property ordered to be sold is described as Nos.476 and 477.

5. The mistake was detected at the time the applicant put in an application for execution.

The applicant prays that the plaint, the judgment, the preliminary decree and the final decree be amended by the substitution of Nos."320" and "321" for "476" and "477" respectively.

No. 8—Application under O.1, R. 8, C.P.C.

The humble petition of____ under O.1, R.8, respectfully showeth:

(1) That the applicants, are the members of the sect of Dasa Jains of Delhi.

(2) That there are about 150 persons of that sect in Delhi.

(3) That the plaintiffs want to bring a suit, on behalf of all the members of the said sect, for the assertion of their right to worship at the Jain temple at Roshanpura, Delhi, and pray for permission for the same.

457, 172 IC 170; *Maimun Nisa* v. *Md. Khodabin*, A 1985 Pat 55). The Court can allow amendment of the decree and the plaint schedule in case of misdescription of property (1991) I Cal LJ 550, (1990) 2 Cal LT 20).

But the court cannot by such amendment alter a decree substantially by taking into consideration a document produced after the decree (*Bal Chand* v. *Narain Das*, 1938 ALJ 1080, 1938 AWR(HC) 773). Nor can a decree be amended so as to allow future interest which was not allowed in judgment (*Thiruganana* v. *Venugopala*, 1939 MWN 1165, A 1940 Mad 29, 50 LW 719; *Gulabh Bai* v. *Ram Pratap*, A 1973 Raj 307). Application under Secs. 152 and 153 read with Sec. 151 when not maintainable see, *Scheduled Caste Co-op. Land Owning Society Ltd* v. *Union of Inda*, A 1991 SC 730. Where third parties have acquired rights, an amendment so as to affect those rights cannot be granted (*Laxman* v. *Maruti*, 184 IC 775, A 1939 Bom 389; *Joy Chandra* v. *Govinda Chandra*, 44 CWN 708). No application can to made by a purchaser of the decree (*Jai Bhagwan* v. *Om Prakash*, 182 IC 830, A 1939 Lah 255).

Application should be made to the court passing the decree and not to the executing court (*Krishnaya* v. *Meghraj*, A 1940 Bom 10). But where a court has ceased to exist and no successor court exists, the application may be made to executing court (*Gaya Singh* v *Mst. Ram Piari*, A 1955 All 622). If a decree capable

No. 9—Application for Amendment Praying for Substitution of Person as Plaintiff [O.1, R.10 (1)] *(g)*

1. The applicant is the guardian of Ramnath minor, appointed under the will of Amarnath, deceased father of the said Ramnath.

2. The applicant honestly believed that his appointment as guardian under the will, had the effect of constituting him the executor of the will by implication.

3. The applicant, in the above *bona fide* belief that he was executor, under the will, brought this suit in his own name, as such executor, for recovery of property belonging to the estate of the said Amarnath.

4. The defendant objected in his written statement that the applicant was not the executor of will by implication and was not entitled to sue in his own name.

5. On this objection, the applicant consulted some eminent lawyers and has been advised that the defendant's contention is right.

6. The said Ramnath minor, being owner of the property under the will, is entitled to sue.

7. The applicant's interest is in no way adverse to that of the said minor, and the applicant is in every way fit to act as the minor's next friend.

The applicant prays that the name of the said "Ramnath son of Amarnath, minor, through Chandra Kishore his next friend" be substituted for that of the applicant, as plaintiff.

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of execution has been passed by appellate court, application should be made to it and not to original court (*Zuleka* v. *Kulsum*, 1940 MWN 834; *Durga Singh* v. *Wahid Raja*, 1964 ALJ 817; *Chandrakala Devi* v. *Central Bank of India Ltd.*, A 1959 Cal 153; *Annappu Ramanna* v. *Panduri Sriramulu*, A 1958 AP 768; *Koraga Shetty* v. *Sheikh M. Latif*, (1967) 2 Mys LJ 317; *Bachan Singh* v. *Harbans Kaur*, A 1973 P &H 103), but when an appeal is dismissed as withdrawn the application for amendment can be filed only in the trial court (*Kale Gowda* v. *Akkoyannma*, A 1974 Kerala 107).

An application for restoration of an application under O.9, R. 13 (*Ramnath* v. *Ganeswar*, A 1986 Ori 26) or for recalling an order passed allowing the plaintiff applicant's own mistaken request for permission to withdraw from the suit (*Rameswar* v. *State*, A 1986 Cal 19) lies under section 151.

(g) The application should be supported by an affidavit.

No. 10—Application for Amendment Praying for Substitution of a Person as Defendant

1. After the institution of this suit the plaintiff came to know from the village *Patwari* that Raj Kishore defendant No.3 was already dead before the suit was filed.

2. The said Raj Kishore has left as his only heir a son named Ram Kishore. For adjudication of the plaintiff's claim it is necessary to implead the said Ram Kishore.

The plaintiff, therefore, prays that the name of Ram Kishore be substituted for Raj Kishore as defendant No.3 and leave be given to the plaintiff to make consequential amendments in the body of the plaint (*or*, the following amendments may be made in the body of the plaint viz.....)

No. 11—Application for Substituted Service (O. 5, R. 20)

1. In the above case, the defendant is keeping out of the way for the purpose of avoiding service of summons.

2. The applicant prays for an order for substituted service of the summons in any manner the court thinks fit.

Affidavit

1. I make oath and say that the summons in this case was first issued to the defendant Ram Narayan at his house in village Ramnagar, and was returned unserved with the report that he had gone to his son in village Salarpur.

2. I make oath and say that when the summons was taken out for Salarpur four days later, it was returned with the report that the said Ram Narayan had gone to his second son in village Amethi.

3. I make oath and say that when the summons was taken to Amethi, it was returned with the report that Ram Narayan had gone to his own house.

4. I make oath and say that summons sent by post was returned with the endorsement "Left without address."

5. I make oath and say that I believe that Ram Narayan is intentionally keeping out of the way to evade service of the summons.

No.12—Application for Striking out Pleadings (O.6, R.16)

1. The following allegations in the plaint are scandalous and irrelevant to the issue involved in the case.

(a) In para 1 of the plaint : "The defendant No.1 has an illicit connection with defendant No.2."

(b) In para 4 of the plaint : "The wife of defendant No.1 ran away with a servant, and that fact created a sensation in the village."

2. The following allegations are unnecessary for the decision of the issues involved in the case and are embarrassing to the defendant:

(a) In para 2 of the plaint : "The defendant is a man of loose character and has contracted heavy debts, the amount of his present liabilities being about one lac of rupees."

(b) In para 6 of the plaint: "The defendant No.1 has mortgaged most of his property."

The applicant prays the allegations specified above be ordered to be struck out from the plaint and the plaint amended accordingly.

No. 13—Application for Rejection of Plaint

1. This is a suit for setting aside a decree on the ground that it was obtained by fraud.

2. In para 2 of the plaint the plaintiff has simply stated that the defendant has obtained the decree by fraud and no particulars of the alleged fraud have been given as required by O.6, R.4. C.P.C.

The defendant prays that the allegation of fraud in para 2 of the plaint be struck out and that as the plaint will not, without that allegation, disclose any cause of action, it be rejected.

No. 14—Application for Amendment of Plaint (O.6, R.17)

1. The plaintiff is owner of the house in suit.

2. The plaintiff has brought this suit for possession of the said house on an allegation of the defendant's tenancy.

3. The defendant has denied his tenancy.

4. In the event of the issue of tenancy being decided against the plaintiff the suit is liable to be dismissed and the plaintiff will have to bring another suit on the ground of his title.

The plaintiff prays that he may be allowed to amend the plaint so as to make an alternative claim on the basis of his title as owner of the house. He is prepared to pay the necessary additional court-fee. The exact amendments which will be made in the plaint after leave is granted are set out in the annexure to this application.

No. 15—Another Application for Amendment

1. The plaintiff brought this suit for the price of certain trees cut away by the defendant from grove No.512.

2. The defendant denies plaintiff's ownership of the said grove, and the real question in controversy between the parties is, therefore, the rights of ownership of the said grove.

3. It is necessary for the final determination of this question and to avoid multiplicity of suits to have the plaint amended.

The applicant pray that he may be allowed to amend the plaint so as to add the following relief as relief (a), and renumbering reliefs (a) and (b) as (b) and (c).

"(a) A declaration that he is the owner of the grove described at the foot of the plaint.

No. 16—Application for Particulars (by defendant)

The plaintiff has not given in his plaint particulars of the following allegations and the applicant prays that he be ordered to give the necessary particulars specified below against each such allegation:

Para of the Plaint	*Allegation*	*Particulars required*
5.	Publication of the alleged libel.	When, where, to whom, how and before whom, the publication was made.
6.	The plaintiff lost his credit and thereby suffered a damage of Rs.20,000.	How did the plaintiff lose his credit and with whom. Particulars of the amount of damages claimed.

No. 17—Application for Particulars (by plaintiff)

The defendant has made certain allegations in his written statement filed on the.....,but without giving any particulars; and the plaintiff prays that he be ordered to deliver particulars as follows :

(1) *As to paragraph 8*, of the alleged payment of Rs.800 stating whether it was in one lump sum or instalments, and, when, where, by whom, and to whom was the payment made.

(2) *As to paragraph 10*, of the alleged agreement, stating whether oral or in writing, if in writing identifying the document, if oral with whom, when and where made.

No. 18—Application under O.9, R.4 or 9, *(h)*

1. One day prior to the date of hearing in the above case, the applicant was suddenly attacked by cholera and remained ill and unable to attend the court on the date fixed.

2. The applicant prays that the order of dismissal of the suit, dated January 4, 1996, be set aside.

No. 19—Application under O.9, R.13, *(i)*

1. That the applicant was one of the defendants in the above case and an *ex parte* decree has been passed against him on January 21, 1996.

2. That he was prevented by the reasons disclosed in the annexed affidavit, which he claims were sufficient, from appearing when the suit was called on for hearing.

The applicant prays that *ex parte* decree passed against him on January 21, 1996 be set aside.

Affidavit in support of the above application

1. I make oath and say that I had to join a marriage ceremony of my sister's son on January 22, 1996, at Jabalpur, and therefore I left my village on January 18, 1996 and returned from it on January 30, 1996.

(h) and *(i)*. An affidavit should generally be filed in support of this application. If an application, under O.9, R.13 is made more than 30 days after decree, the date of applicant's knowledge of the decree must be alleged in the application, otherwise the court has no jurisdiction to entertain it (*Karam Singh* v. *Barkat Ram*, 109 IC 82).

2. I make oath and say that, on January 16, 1996, I had given my papers to Sri Chaman Lal, Advocate, and had instructed him to file the *Vakalatnama* and written statement on my behalf on January 21, 1996, the date fixed for issues.

3. I am informed by Sri Chaman Lal, Advocate, and I verily believe it to be true, that, on January 21, 1996, when the case was called on, Sri Chaman Lal was engaged in a Sessions case, before the Additional Judge at Kanpur.

4. I am informed by Sri Chaman Lal, and, verily believe it to be true, that when Sri Chaman Lal came to the court a few minutes later, he found the case had been decreed *ex parte*.

No. 20—The like, on Another Ground

1. That the applicant was the defendant in above case, and an *ex parte* decree has been passed against him on November 30, 1995.

2. That the summons for final hearing issued against the applicant was not duly served upon him.

[If the application is made more than 30 days after the decree add-

3. That the applicant came to know of the said decree on March 10, 1996, (*this date should be one within 30 days next before the application*)].

The applicant prays that the *ex parte* decree be set aside.

Affidavit

1. I make oath and say that no summons was served on me in this case.

2. I make oath and say that I did not know of the institution of the suit or of the passing of the decree until March 10, 1996.

3. I make oath and say that it was on March 10, 1996, that I learnt for the first time on receipt of a notice of execution under O.21, R.22, that a decree had been passed against me.

If the decree is of a Small Cause Court, the applicant should deposit the decretal amount or security for it as required by section 17, Provincial Small Cause Court Act, at the time of making the application. It will be sufficient if the deposit is made within limitation (*Narain* v. *Rudan*, 5 Luck 294; *Qabul Singh* v. *Jai Prakash*, A 1939 503; *Sri Nivas* v. *Lala Durga Prasad*, A 1947 All 125).

No. 21—Application under O. 11, R. 1, for Leave to Deliver Interrogatories *(j)*

The plaintiff prays for leave to deliver the interrogatories annexed herewith for the examination of Ramchandra, defendant No.1, and Sham Kishan defendant No.2.

(*Or*, The plaintiff prays that the interrogatories annexed herewith be delivered to Ramchandra, defendant No.1, and Sham Kishan, defendant No.2, respectively, for being answered within 10 days of the receipt thereof).

No. 22—Application under O. 11, R. 12, for Discovery of Documents *(k)*

1. One of the questions at issue between the parties in this case is whether the plaintiff purchased the grain on his own account or on behalf of the defendant.

(j) The language of O.11, R.2, shows that a party should obtain permission from the court and should then himself deliver the interrogatories to the opposite party, and that the order of the court to answer interrogatories should be made only when the party interrogated neglects to answer the interrogatories or answers them insufficiently. But as direct service of notice is not in vogue in the *mufassil*, the practice is to file interrogatories in court with an application and then to leave the court to serve them. The same is the practice in the case of notices to admit facts and documents and to grant inspections. There is no express rule in the Code under which this assistance of the court to serve such interrogatories or notice is sought, but in practice the courts help them, though they should encourage the parties to serve their notices, etc., directly on the pleaders for the opposite parties. If a party is ordered to answer interrogatories he is not bound to answer personally in the absence of a specific direction to that effect and the affidavit may, therefore, be sworn by a recognised agent who knows the facts (*K.C.Majumdar* v. *Suraj Singh*, 193 IC 707, A 1941 Nag 205). The court cannot take *suo motu* action to strike off the defence of the defendant on its failure to comply with the order of the court to answer interrogatories or for discovery or for inspection of the documents, application by the opposite party for the purpose is necessary (*State of Punjab* v. *Jayter Singh*, 1995 AIHC 2464 (P & H).

(k) This is a very useful process, full advantage of which is not taken in the *mufassil*. A party can at once know the cards in the hands of his adversary and can then call upon him to grant inspection or to produce the documents if they are of help to him in advancing his own case or in damaging that of his adversary. The right is very wide and is not limited only to documents which will be relevant at the trial (*Nathulal* v. *Shantilal*, 1961 MPLJ Notes 237) and the other party is bound to disclose all documents in his affidavit (*United Bank of India* v. *Nederlandasche*

2. Another question at issue is whether the plaintiff paid any money to any body on account of loss on the *khatti* transactions on behalf of the defendant.

3. It is necessary for fair disposal of the case and to save costs to have a discovery of documents relating to these matters.

The defendant prays that an order may be made directing the plaintiff to make discovery on oath of the documents which are, or have been in his possession or power, relating to the questions mentioned in paras 1 and 2 of this application.

No.23—Application for an Order for Inspection under O. 11, R. 18 (1) *(l)*

1. The plaintiff applicant gave a notice, through his pleader, the defendant to produce for the applicant's inspection his *rokar and khata bahis* for 2034, 2035 and 2036 *Samvat*, and the notice was served on the defendant's pleader on October 20, 1995.

2. The defendant or his pleader has not sent any notice in reply fixing time and place for the inspection, though 10 days have expired since the service of the applicant's notice (*or*, the defendant has sent a notice to plaintiff's refusing to grant the required inspection).

Standard Bank, A 1962 Cal 325 DB). The Calcutta High Court insisted that no relevant document should be omitted from the affidavit of discovery and full description of each document must be given so that the order of production and inspection if made can be enforced, even though he may object to their production when required to produce them (*Gobinda* v. *Magneram*, A 1940 Cal 331, 190 IC 50). An application for discovery should precede an application for production (*Ghulam Mohiuddin* v *State*, A 1961 J & K 20).

(l) The rules provide that an attempt to get inspection should at first be privately made by serving a notice under Rule 15, on the other party, and, if this fails, an application can then be made to the court. To such application, acknowledgment of service of notice on the opposite party and his reply, if any, should be annexed and the application had better be supported by an affidavit (*Dhapi* v. *Ram Prasad*, 14 C 768). But this procedure is applicable to inspection of documents which are referred to in the pleadings or particulars or affidavits of the other party. If inspection is required of documents which are not so referred to, no previous attempt to obtain private inspection is necessary, nor can such private inspection be demanded, but an application should be made directly to the court for an order for inspection. The applicant will have to show by an affidavit, to be annexed to such application, that these documents are in the possession of the

3. The said inspection is necessary for the fair disposal of the case as the plaintiff cannot be prepared to meet the defendant's evidence at the trial without first getting a thorough acquaintance with the account-books on which the defendant will rely.

The plaintiff, therefore, prays for an order for the inspection of the said *bahis*.

No. 24—Application for an Order for Inspection under O.11, R.18 (2)

For the reasons given in the annexed affidavit, the plaintiff prays for an order for inspection of the documents referred to in para 1 of the said affidavit.

Affidavit

1. I make oath and say that the following documents are in possession of the defendant Raja Ram.

Rokar bahi for 1995.

Nakal bahi for 1995.

Khata bahi for 1995.

2. I make oath and say that I have received legal advice, which I believe to be true, that I am legally entitled to inspect the said documents.

3. I make oath and say that the transactions in dispute are entered in the said documents, and that it is necessary for the saving of costs and for a fair disposal of the case that inspection of the same should be granted to me.

No. 25—Application for Summoning a Record O.13, R.10 *(m)*

For reasons mentioned in the annexed affidavit, the applicant prays that the following records be sent for and inspected :

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other party, that the applicant is legally entitled to their inspection, and that the inspection is necessary for the fair disposal of the suit or for saving costs [O. 11, R. 18(2)].

(m) The affidavit supporting the application should clearly specify (i) how the record is material, and (ii) that a certified copy cannot serve the purpose, or (iii) that copies cannot be obtained without unreasonable delay or expense. It is not sufficient merely to state that the record is material or necessary for the ends of justice. The usual practice is to insist on production of certified copies of those

(1) Record of suit No.198 of 1958 *Ram Chandra* v. *Mohd. Ali*, decreed by the Civil Judge, Etawah, on December 20, 1958.

(2) * * * * * *

(3) * * * * * *

Affidavit

1. I make oath and say that I am the plaintiff in the above suit.

2. I make oath and say that production of the original record of suit No.198 of 1958 mentioned in the accompanying application is material as it contains a promissory note and several written receipts by the defendant, and the said promissory note and receipt will be required for comparison of defendant's handwriting, and, as the said papers were filed by other persons, they cannot be returned to the plaintiff.

3. I make oath and say that the plaintiff has filed certified copies of plaint and written statement from record of suit No.124 of 1953 mentioned in the accompanying application and that the defendant has not admitted the said papers.

4. I make oath and say that the said papers referred to in para 3 of this affidavit are relevant to the issue No.2 in this case, and the production of the original record is necessary to prove them.

5. I make oath and say that the record of suit No.965 of 1951 contains a long account extending over 290 pages filed by the defendant's father, and that I want to tender the same as my evidence on issue No.3 in this case.

6. I make oath and say that on my application for a copy of the said account mentioned in para 5, I have been ordered to deposit Rs.825 as copying charges, and I have been informed by the Head Copyist that it will take at least 20 days to prepare the copy, and the copy cannot, therefore, be ready before November 14, 1995, the date fixed for trial of this case.

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papers, the originals of which it is necessary to prove, before the originals are sent for. The original is sent for only if the other party does not admit the copy or there are any special reasons for production of the original.

No. 26—Certificate of Decree-Holder under O.21, R. 2 *(n)*

1. Ramlal, holder of the decree in the suit described above, hereby certify that the whole of my said decree has been satisfied by the judgment-debtor :

(1) paying Rs.200 to me in cash.

(2) giving me a cow for Rs.6000.

No. 27—Application under O. 21, R. 2(2)

1. The applicant is the judgement-debtor to decree No.502 of 1991 passed by this court.

2. On January 4, 1992, the applicant paid to the decree-holder, out of court, a sum of Rs.200 in part payment of the said decree.

The applicant prays that, after the usual notice to the decree-holder, the said payment be recorded.

(n) No court-fee is required on the certificate but the decree-holder should not make any prayer. It is not necessary that cash payment should have been made but a decree can be adjusted by any lawful agreement between the parties (*Satyabadi* v. *Mani Sahu*, 165 IC 940, A 1936 Pat 619; *Radha Krishna* v. *Mt. Bechni Devi*, A 1940 Pat 56). It is not necessary to specify the particulars of satisfaction, though the decree-holder may specify if he likes. When the decree-holder himself certifies adjustment, the court need not go into the question but must record the satisfacton (*Champi Bai* v. *Pearey Lal*, 1937 ALJ 1305, A 1938 All 116, 174 IC 254, 10 RA 555), and any error on the part of the court in refusing or neglecting to record the adjustment cannot prejudice the rights of the parties (*Swaminath* v. *Samba*, 174 IC 18, A 1937 Rang 507). But an adjustment under O. 21, R. 2 must be of an executable decree, and not, for instance of a preliminary decree for sale, adjustment of which would fall within the purview of O. 23, R.1 or 3, (*Ram Nivas* v. *Ram Dayal*, 1938 ALJ 1231, A 1939 All 174, 1931 AWR 859, 180 IC 244; *Raja Ram* v. *Allahabad Bank Ltd.*, A 1939 Lah 79). The application can be made to the court to which the decree has been transferred for execution (*Jagdish* v. *Saw Eo*, A 1940 Rang 236, 190 IC 680). There is no limitation for decree-holder to certify adjustment. Certification by a decree-holder is not an application and therefore it can be done at any time (*Raja Sri Prakash Singh* v. *Allahabad Bank Ltd.*, A 1929 PC 19; see also *Bhudeb Chandra Roy* v. *Satya Narain Trigunait*, A 1951 Pat 593). The Allahabad High Court has held that such a certificate cannot be filed by the decree-holder in execution proceedings after a controversy has arisen consequent on the judgment debtor's objection (*Joti Prasad* v. *Sri Chand*, A 1928 All 629 FB; *Ram Prasad* v. *Jadunandan*, A 1934 All 534). But the period of limitation for an application by the judgment-debtor is 30 days from the time payment or adjustment is made, vide Article 125 Limitation Act, 1963.

No. 28—Petition of Claim under O. 21, R. 58 *(o)*

The above-named claimant begs to state as follows :

1. The opposite party No.1 has attached the following (among other) property in execution of his decree No.128 of 1993, under execution in this court against opposite party No.2.

2. The said property belongs to the claimant.

3. The said property has been attached from the claimant's possession for, it was, at the time of attachment, in possession of the opposite party No.2 as hirer (*or*, tenant of the same on behalf of the claimant).

The claimant prays that the said property be released from attachment.

No. 29—Application under O. 21 R. 89, *(p)*

1. The applicant is the judgment-debtor and owner of the property

(o) In a claim under this Rule the claimant must allege and prove that he had an interest in the attached property on the date of the attachment (*Saceda Begum* v. *Sabir Ali*, A 1962 All 9). The judgment-debtor ought to be impleaded as proforma party to the objection (*Thomman Mathai* v. *Ithendan Konjukochu*, A 1963 Ker 236), for if he is not impleaded the adjudication will not affect his rights. As a claim or objection under this rule can be summarily dismissed on the ground of delay, the cause of delay should be explained in the petition if it is filed with any appreciable delay. If the judgment-debtor claims the property in a capacity different from that in which a decree has been passed against him, it has been held in some decisions that he must come under section 47 (*Shah Naim* v. *Girdhar Lal*, 100 IC 464, 4 OWN 102; *Rangan* v. *Lakshmi*, 14 MLJ 137; *Karimunissa* v. *Alfuddin*, A 1960 MP 76; *Nabi Bakhs* v. *Udho Ram*, 28 PLR 121, 100 IC 786; *Chettiar* v *Teo*, 104 IC 121, 6 Bur LJ 107, 5 R 393), while most other decisions have taken a contrary view (*Fateh Chand* v. *Mahant Ganeshgir*, A 1930 Nag 293; *Somwar Gir* v. *Goswami Mayanand*, A 1928 All 392 DB; *Barari Co-operative Bank* v. *Singheshwar*, A 1936 Pat 256; *Abdurabiman* v. *Kunhammed*, 10 MLJ 85; *P.Mammad Haji* v. *Ibran Haji*, A 1916 Mad 789 (1) DB; *Kartik* v. *Ashutosh*, 39 C 298 FB, 12 IC 163, 14 CLJ 425, 16 CWN 26). If sale has been held no claim under this rule can now be entertained after the 1976 Amendment. A regular suit will then lie. An order refusing to entertain an objection under this rule is not appealable, while an order of adjudication on merits is appealable like a decree (*B.M. Aishabi* v. *Yakub*, A 1984 Ker 237). An application by a simple mortgagee for having his charge notified is one under rule 58 (*Debi Das* v. *Rup Chand*, 102 IC 792, 25 ALJ 609; *Jagannadham* v. *Padayya*, 134 IC 809, 1931 MWN 902, A 1931 Mad 782, 61 MLJ 884).

(p) The application must show the right under which the applicant claims to be entitled to make the application under this rule. A lessee, subject to whose lease

which has been sold by auction in the above execution case (*or*, the applicant is a mortgagee of the property sold in this case on behalf of the judgment debtor).

2. The said sale took place on November 20, 1995.

3. The applicant begs to deposit.

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the property is sold, can apply (*Bodapati* v. *Bodapati*, 51 M 777, A 1928 Mad 1191, 109 IC 168 DB).An interim receiver of judgment-debtor's estate can also apply (*Ankayya* v. *Official Receiver, Kistna*, 171 IC 220, A 1937 Mad 589). Both the decree-holder and the purchaser should be impleaded as parties to this application though this is not absolutely necessary (*Jit Singh* v. *Daulatia*, 124 IC 32, A 1930 All 167 and also *see* next note). A purchaser after attachment can apply (*Jamna Das* v. *Jalaluddin*, A 1936 Lah 561), but not after auction sale (*Baghunath* v. *Hari Ram*, A 1940 Sindh 181). Even a person with whom judgment debtor has penditng attachment, made a contract of sale can apply (*Mundrika* v. *Nand Lal*, A 1941 Pat 204) and so also such judgment debtor (on the ground that he is owner of the property until the auction sale is confirmed) joining in the application with the transferee (*Fatima-ul-Hasna* v. *Baldeo Sahai*, A 1926 All 204(2) FB). When share of one member of a Joint Hindu Family is sold, others have a right to apply (*Ramachandra* v. *Srinivas*, 51 M 246, A 1928 Mad 399, 109 IC 297).

The deposit required by the rule is a condition precedent to the making of an application to set aside a sale. The money referred to in the rule should be deposited along with the application or, in any case, before the period of limitation (30 days from the sale) which cannot be extended by court (*Maung Lal* v. *Kyow*, A 1933 Rang 8; *Nasiruddin* v. *Hakim Md.*, 161 IC 26, A 1936 Pat 119; *Munni Lal* v. *Sona*, A 1982 All 29; *P.K. Unni* v. *Nirmala Industries*, A 1990 SC 993), but if the deposit was short owing to miscalculation of office, the applicant should get another opportunity to make it good (*Gopinath* v. *Hiraman*, A 1933 Pat 515, 146 IC 971; *Rangini* v. *Hiralal*, 33 CWN 1170; *Suresh* v. *Janendra*, 68 CLJ 273), but there can be no condonation if the shortage was due to applicant's own miscalculation (*Kalidasa* v. *Dodda Suddhra*, A 1947 Mad 165, (1946) 2 MLJ 371; *Amritlal* v. *Sadashiva*, A 1944 Bom 233). The Calcutta High Court has allowed the deposit of only 5% in court when the decretal amount was said to have been satisfied out of court. In such cases, it has been further held that alleged satisfaction out of court can be challenged only by the decree-holder and not by the purchaser (*Mahendra* v. *Parasmani*, A 1938 Cal 252, 68 CWJ 264, 11 RC 232; *National Insurance Co.* v. *Ezekiel*, 41 CWN 998). In a case where the decree itself had been set aside in appeal, the judgment-debtor was permitted to apply for setting aside the sale on deposit of 5 per cent only, as no money remained due to the decree-holder (*Vithola* v. *Dhanaj*, A 1948 Nag 126).

In some decisions it has been held that a formal application under this rule is not necessary and a *challan* or tender of the amount required is sufficient (*Mahboob* v. *Majid*, A 1939 All 241; *Durga Prasad* v. *Ram Lakhan*, 1995 LCD 209, 1995 (I) ARC

(a) For the purchaser, opposite party No.2—Rs. 1050.

(b) For the decree-holder, opposite party No.1, Rs.30,900, the amount entered in the sale proclamation.

The applicant prays that the said sale be set aside.

No. 30—Application under O. 21, R. 90 *(q)*
(On the Ground of Irregularity)

1. The applicant was, on the date of sale, owner of the property specified at the foot of this application and sold in the above execution case.

2. The property was worth Rs.10,000 but it has been sold for Rs.2,000.

3. The low bid was due to irregularities in publishing and conducting the sale.

Particulars of irregularities

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26 (All); *Jyotish Chandra* v. *Surendra Nath*, A 1939 Cal 153), but the rule itself requires a formal application (*Dhari* v. *Gauranga*, A 1940 Pat 87). If a part of the decree is satisfied out of court, it is sufficient to deposit the balance only (*Muthin Venkatapathad* v. *Kuppur*, A 1940 Mad 42; contra *Ado Das* v. *Bansi Das*, A 1940 Pat 612). But unless the decree has been satisfied out of court or by deposit in court, even decree-holder's consent will not satisfy the requirement of the rule (*Ramchandra Rao* v. *Maddi Kutumb Rao*, A 1967 SC 1637; *Tribhuwan Das* v. *Rati Lal*, A 1968 SC 372). Notice to auction-purchaser is sufficient and he need not be made a party (*Vithola* v. *Mahadeo*, A 1948 Nag 303).

There should be a prayer for setting aside the sale, though omission of such prayer has been held not to invalidate the application (*Banarsidas* v. *Ramchandra*, A 1933 Lah 210). A sale cannot be set aside in part under this rule (*Laxmansingh* v. *Laxminarayan*, A 1948 Nag 127).

(q) Both the decree-holder and the purchaser should be impleaded (*Ali Gauhar* v. *Bansidhar*, 15 A 407; *Karamat Khan* v. *Mir Ali*, 11 AWN 121; *S.V.Kanakraj* v. *Vijaya Bank, Mangalore*, A 1987 Kant 252) but even if either of them is not impleaded it is not a serious defect as all that it is required by law is a *notice* to both and not that they should be shown as parties to the application (*Kirpa* v. *Nandlal*, 107 IC 494; *Ganesh Bob* v. *Vithal Vaman*, 37 B 387; *Raj Chandra* v. *Kali Kanto*, A 1923 Cal 394, 82 IC 776 DB; *Sain Das* v. *Punjab National Bank*, A 1928 Lah 418, *Dip Chand* v. *Sheo Prasad*, 27 ALJ 769, A 1929 All 593 DB; contra, *Ajuddin* v. *Khoda*, 50 IC 5; *Sumitra* v. *Damrilal*, 62 IC 61 Pat). But where an application was refused and an appeal was preferred without impleading the purchaser, court refused to implead the purchaser after the expiry of the period for appeal and dismissed the

(i) The sale proclamation was not affixed to any conspicuous part of the property sold.

(ii) The sale was not proclaimed by beat of drum on, or adjacent to, the property or at any other place.

(iii) The amount of the encumbrance of Ramlal was Rs.1,000 but it was wrongly mentioned in the proclamation as Rs.4,000.

(iv) The time fixed for sale in the proclamation was between 12 and 4 in the day but the Amin conducted the sale at 6 p.m.

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appeal (*Ramlal* v. *Kidar Nath*, 163 IC 698, A 1936 Lah 478). The applicant must show his right to apply. Any person whose interests are affected by the sale can apply, e.g., a judgment-debtor or an attaching creditor (*Raja Ram Raja Saheb* v. *Bhawani Shanker Joshi*, 1938 MWN 1225, 1938 (2) MLJ 940). It is not necessary that he should be the owner of the property. Where a decree provided for sale of item 1, and sale of item 2 only if proceeds of sale of item 1 proved insufficient, it was held that the owner of item 2 could apply (*Narayan* v. *Pappayi*, 103 IC 499 M). The auction-purchaser himself can also apply (*Subramaniam* v. *Chettyar*, 5 R 516, 105 IC 465; *Sangidas* v. *Chahadu*, 168 IC 970, A 1937 Nag 140; *Penmatsa Jankiamma* v. *Atchanta*, A 1985 AP 234). A purchaser after sale cannot apply, but judgment debtor can still apply (*Shankar Prasad* v. *Md. Taqi*, 1936 OWN 344, 161 IC 424; *Kiranbala* v. *Suniti*, 173 IC 693, A 1939 Cal 146). A judgment-debtor can apply in spite of his having been adjudged insolvent (*Manthiri* v. *Arunachala*, A 1940 Mad 569), but a monthly tenant cannot (*Brij Gopal Bhatia* v. *Union of India*, A 1963 All 445).

A third person who claims the property but does not perfer the claim under rule 58 cannot apply under rule 90 (*Jagat Narayan* v. *Khator Singh*, 195 IC 173, A 1941 PC 45; *Cherruppan* v. *Shankare*, A 1941 Mad 680). Persons entitled to rateable distribution under section 73 can apply but not all creditors proving insolvency (*Official Receiver* v. *A.L.R.Veorappa*, A 1943 Mad 199).

A decree-holder attaching property after sale cannot apply (*In re Govindasami, In re*, 184 IC 166, A 1939 Mad 501). Inclusion of property not included in the decree is also a fraud in publishing sale and the remedy is by application and not by a suit (*Piare Lal* v. *Kishan Lal*, 110 IC 876, A 1928 All 704; *Baru* v. *Amir Singh*, 1939 ALJ 1015, 1939 AWR 867, A 1940 All 78). A false representation which dissuaded bidders has been held to amount to fraud (*Jagdish* v. *Kunja*, 171 IC 822, A 1937 Cal 273).

The irregularity or fraud must be specifically alleged with particulars and a vague and general allegation will not be sufficient. The applicant must allege the injury he has suffered and must also allege a direct relation between the alleged irregularity or fraud and the alleged injury. This latter is absolutely necessary, as irregularity and injury alone are not sufficient unless it is shown that injury resulted from the irregularity (*Harindranath* v. *Bholanath*, 1937 AWR 262, 170 IC 559,

Particulars of their consequences

1. As a result of irregularities Nos.(i) and (ii) Abdur Rahman, Ramadhar, Lotan Singh and other persons whose names are unknown to the applicant, who would have bid at the sale, did not receive any information of the sale.

2. As a result of irregularity No.(iii) those who were present did not bid so high as they would have, had the amount of the encumbrance not been wrongly overstated.

3. As a result of the irregularity No.(iv), Ram Prasad, Maula Baksh, and Chatar Lal who had gone to the spot to purchase the property left the place at 4 p.m., and very few purchasers were present when the sale was held.

The applicant prays that the said sale be set aside.

No. 31—The like on Ground of Fraud

1. and 2. *Same as in previous precedent.*

3. The low bid was due to the fraud of the decree-holder.

Particulars of Fraud

On the morning of the date fixed for sale (January 14, 1996) the decree-holder told Ramjilal, Ram Pratap, Chatar Singh and Lalmandas who were intending purchasers, that the sale had been postponed to

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A 1937 All 407; *Sri Raja Bommadevma Najanna Naidu* v. *Sri Rajah B.V. Naidu*, A 1945 PC 178; *T. Venkataparthasarathi* v. *T.Ramchandra Rao*, A 1984 AP 398). Sale can be set aside on the ground of material irregularity and not on mere irregularity (*Desh Bandhu Gupta* v. *N.L.Anand*, (1994) ISCC 131). If a sale is intended to be set aside, not on the ground of irregularity or fraud in publishing or conducting the sale but on ground of an illegality, e.g., a sale made after an order of postponement by the court or sale of ancestral property as non-ancestral or *vice versa*, an application must be made under section 47 and not under O. 21, R. 90. So also, if the ground is fraud, otherwise than in conducting or publishing (*Bhan Kumar* v. *Lachmi Kant*, A 1941 Pat 566).

Where an application has been made for setting aside a sale under O. 21, R. 90 and is pending, it is not competent to the judgment-debtor to make or present another application under O. 21, R. 89 (*Gourdhandas Kanhayia Lal* v. *Ranchhoddas Bikhari Lal*, A 1949 Bom 271; *Shiv Prasad* v. *Durga Prasad*, A 1975 SC 957). Some High Court have added additional provisions to the Rule, which may be seen with advantage.

another date, and this prevented them from going to the place of sale and bidding at the sale. The said statement was false and the decree-holder knew that it was false, and he made it fraudulently. The result was that only 4 persons attended the sale, and the decree-holder purchased the property at a low price.

No. 32—Application under O. 21, R. 91 *(r)*

1. The applicant was purchaser of the property specified at the foot of this application at an auction sale held by the Collector of Meerut on May 20, 1996, in execution of decree No.256 of 1994 of this court.

2. The judgment-debtor Abdul Ali had by a sale-deed dated _____, sold the said property to his wife in lieu of dower debt and had therefore no saleable interest in it on the date of the said sale.

The applicant prays that the said sale be set aside.

No. 33—Application under O. 21, R. 97 *(s)*

1. The applicant is the decree-holder in the above-mentioned case (*or*, the applicant is an auction-purchaser of the house mentioned below in execution of the decree in the above case).

(r) This application can be made only when the judgment debtor has no saleable interest at all. If he has some interest, though very small the sale cannot be set aside, nor is a suit for compensation for loss of the property maintainable, but if a part of the property is lost, the auction-purchaser can sue the decree holder for refund of the proportionate price within 3 years under Articles 24 and 47. The purchaser will, on sale being set aside, be entitled to refund of his purchase money under Rule 94. The application should be made within 30 days of the sale (Article 127). It is important to note that this is the only remedy of the auction-purchaser. If he does not make an application under Rule 91 and the sale is confirmed he cannot sue the decree-holder for refund of the purchase money even if he is dispossessed by the real owner (*Idia* v. *Lachmi Narain*, 1936 AWR 982, 1936 ALJ 1196; *Amal Chandra* v. *Ram Swarup*, 184 IC 453, A 1939 Cal 310; *Abinash Ch.* v. *Motilal Mukerji*, A 1961 Cal 172; *Tadavalli* v. *Maddi Patta*, A 1965 AP 239; contra *Thakurlal* v. *Nathulal* A 1964 Raj 140).

(s) An application under O.21, R.97 or under section 151 is not maintainable for challenging the decree; a separate suit would be necessary for the purpose (*Mohfooz Ali* v. *A.D.J.*, 1985 ALJ 281, following, *Usha Jain* v. *Manmohan*, A 1980 MP 146). A third party claimant cannot insist on an investigation under O.21, R. 97 even before his dispossession; he may either file a separate suit for injunction or wait for his dispossession and then apply under O.21. R. 99 (*Usha Jain*, supra;

2. The applicant took out a warrant for delivery of possession of the said house.

3. On January 14, 1996, the Amin went to execute the said warrant, but the opposite party No.1 (the judgment-debtor) and also opposite party No.2, at the instigation of the opposite party No.1 obstructed the said Amin in delivering, and the applicant in obtaining possession of the said house.

The applicant prays for an order under O.21, R.97, directing the applicant to be put in possession.

No. 34—Application under O. 21, R. 99

1. The applicant is owner of the house described below and was, on the date hereinafter mentioned, in possession of the same on his own account (*or*, one Ramkishen is the owner of the house and the plaintiff was, on the date hereinafter mentioned, in possession of the same as tenant on behalf of the said Ramkishen).

2. The opposite party obtained a decree No.300 of 1990, from this court for delivery of possession of the said house, (*or*, the opposite party purchased the said house in execution of decree No.300 of 1990 of this court).

3. The applicant was no party to the said decree.

4. On January 14, 1996, the opposite party, in execution of a warrant of delivery of possession obtained from this court, dispossessed the applicant.

The applicant prays that he may be put into possession of the said house.

Madanlal v. *Hansraj*, A 1985 Raj 19; *K.A.Prabakaran* v. *Kuttien*, A 1985 Ker 204; *Mahfooz Ali*, supra; *Harijan Wood Workers Cooperative Society* v. *Maya Wati*, A 1985 P&H 181; contra *Ramchandra* v. *Manmal*, A 1983 Sikkim 1). Persons in possession under permission from licensee or tenant whose licence or tenancy stands terminated are also bound by the decree for possession passed against licensee or tenant (*Lucy George* v. *Nagpur R.C.Diocesan Corporation*, A 1986 MP 7).

No. 35—Application for Substituting the Heirs of a Deceased Plaintiff (O.22, R.3) *(t)*

1. Ram Prasad, plaintiff in this civil suit has died on January 13, 1980.

2. The said Ram Prasad's right to sue in this suit survives, and the applicants being his sons are his legal representatives.

The applicants pray that the court may be pleased to substitute the names of the applicants as plaintiffs in place of the deceased Ram Prasad and to proceed with the suit.

No. 36—Application for Substituting Heirs of a Deceased Defendant (O.22, R.4)

1. Allauddin, one of the defendants in this suit, has died on June 3, 1995.

2. The right to sue in this suit does not survive against the surviving defendants.

(t) Such application should be accompanied by an affidavit. It should be made within 90 days from the date of death (Article 120), but if a plaintiff brings on record all the heirs then known to him and leaves out one of whom he had no knowledge, his application to implead the latter can be made within 3 years under Article 181 [*Abdul Baki* v. *Bansilal*, A 1945 Nag 53 (now Article 137)]. If the legal representatives of a deceased plaintiff or defendant are already on the record no formal application within the fixed period need be made but plaintiff may make a statement to the court at any stage of the suit and get the fact noted on the record (*Achuthan* v. *Manavikra-Man*, 51 M 347, 109 IC 372, 54 MLJ 675; *Punyabrata* v. *Monmolia*, A 1934 Pat 427; *Sankru* v. *Bhoju*, 165 IC 612, A 1936 Pat 548; contra *Santoolal* v *Champalal*, 150 IC 915, A 1934 Nag 165; *Bhudeb* v. *Bhikshanker*, 196 IC 837; *Khodadad* v. *Bai Jerbai*, 39 BL R 1156; *P.P.K. Gopalan Nambiar* v. *P.P.K. Balakrishnan Nambiar*, A 1995 SC 1852). An application is necessary for bringing legal representative on record (*Union of India* v. *Ram Charan*, A 1964 SC 215). In the absence of fraud or collusion some heirs of a deceased appellant applying to be brought on record can represent the estate (*Dobai Mabico* v. *Krishna Chandra Patnaik*, A 1967 SC 49). But if appeal abates against one appellant court cannot pass decree in favour of all under O. 41, R. 4, nor in favour of remaining appellants if it results in two inconsistent decrees (*Sri Chand* v. *Jagdish Pal Krishan Chand*, A 1966 SC 1427; *Narain Prasad* v. *Naresh Chand*, ILR (1979) 1 Delhi 723). An order of substitution under O. 22 R. 5 does not operate as res-judicate in a title suit between rival claimants to succession (*Mohinder Kaur* v. *Piara Singh*, A 1981 P & H 130, FB).

3. The names and addresses of the legal representatives of the said Allauddin are given below :

The applicants pray that the court may be pleased to substitute the persons mentioned in para 3 above as defendant in place of Allauddin deceased and may proceed with the suit.

No. 37—Application to Set Aside an Abatement of Suit by Reason of Defendant's Death (O.22, R.9) *(u)*

1. Khuda Baksh, defendant in the above case died on January 16, 1996,and no heirs of the said Khuda Baksh having been brought on the record within the period prescribed by law, the suit abated on April 16, 1996.

2. The applicant was prevented by the sufficient cause disclosed in the annexed affidavit from applying for substitution and continuing the suit.

The applicant prays that the said abatement be set aside and the name of Maula Baksh be substituted for that of Khuda Baksh as defendant.

Affidavit

1. I make oath and say that I did not know of the death of Khuda Baksh defendant in this case until January 14, 1998.

2. I make oath and say that I learnt of the death of the said Khuda Baksh for the first time on January 14, 1998.

3. I make oath and say that Maula Baksh is the son and the only heir of the said Khuda Baksh.

No. 38—Application to set Aside Abatement of Suit by Reason of Plaintiff's Death (O. 22, R. 9)

1. Ram Lal, plaintiff in the above case and the deceased husband of the applicant, died on October 16, 1995, and no heirs having been brought on the record within the period prescribed by law, the suit abated on January 16, 1996.

(u) Such an application should be accompained by affidavit. *Bona fide* ignorance of death is sufficient cause for setting aside an abatement. But mere allegation of belated knowledge is not sufficient. Reasons for late knowlege must be stated (*Union of India* v. *Ramcharan*, A 1964 SC 215). Courts, however, take a liberal view in condoning delay (*Sital Prasad* v. *Union of India*, A 1985 SC 1). The suit abates automatically on expiry of the period fixed for substitution of heirs

2. The applicant was prevented by the sufficient cause disclosed in the annexed affidavit from continuing the suit.

The applicant prays that the said abatement of the suit be set aside and the name of the applicant be substituted for that of Ram Lal as plaintiff.

Affidavit

1. I make oath and say that I am the widow of Ramlal, plaintiff in the above mentioned case.

2. I make oath and say that, on March 14, 1996, my brother Indra Narayan, who manages my property, found papers of the said case amongst the papers of the said Ram Lal.

3. I make oath and say that, on the 4th day of March, 1996, the said Indra Narayan told me of the said case and then for the first time I came to learn of the said case.

4. I make oath and say that before the date mentioned in para 3 of the affidavit I was not aware of the above mentioned suit.

No. 39—Application under O. 23, R. 1, for Withdrawal of a Case with Liberty to bring a fresh suit *(v)*

1. There is a plea of misjoinder of defendants and causes of action in this suit and the suit must fail by reason of this formal defect.

(*Ala Bhai* v. *Bhure*, A 1937 Bom 401). Formal order of abatement is not necessary (*Chunnilal* v. *Amorichand*, A 1933 Lah 356). An application to have the abatement set aside must be made within 60 days of the abatement, i.e., from the date on which the abatement takes place under the law, and not from the date on which the order of abatement is recorded by the court (*Churya* v. *Rameshwar*, 24 ALJ 360; *Fazal Rahim* v. *Hussaina*, A 1939 Lah 572). If a party to a decree under O. 34, R. 4, dies before passing of the final decree. O. 22, R. 3 or 4 does not apply as there is no suit which can abate; the suit having culminated in a decree, an application for substitution of legal representatives in such cases can be made under O. 22, R.10 (*Eknath* v. *Hanmant Ram*, A 1947 Nag 75; *Daworali* v. *Boi Jodi*, A 1940 Bom 318, 192 IC 405; *Nazir Ahmmad* v. *T.Tamiyaddi*, A 1929 Cal 430, 57 C 285 DB; *Mt. Lakhpati* v. *Daulat Singh*, A 1927 Oudh 156, 2 Luck 464 DB; *Mt. Bholia* v. *Alidas Shankur*, A 1931 Pat 57; *Perumal Pillai* v. *Perumal Chetty*, A 1928 Mad 914 FB; *Allauddin* v. *Biran*, A 1949 Pat 259).

(v) Non-joinder of necessary party or bar of section 69, Partnerships Act are not formal defects as they go to the root of maintainability of the suit (*Khatuna* v. *Ramsevak*, A 1986 Ori 1).

2. The plaintiff prays that permission be granted to him to withdraw the claim in respect of house No.1 against defendant No.2, with liberty to bring a fresh suit in respect of the said house against the said defendant No.2.

No. 40—Application for having a Decree Passed in Accordance with an Alleged Compromise not Admitted by the Other Party (O.23, R.3) *(w)*

1. After the institution of this suit, on April 14, 1996, the claim was adjusted wholly by a compromise between the parties, which was in writing and signed by the parties.

2. The following were the terms of the said compromise: (i) That the plaintiff should withdraw his suit about house No.1, and the claim about house No.2 be decreed, (ii) that the defendant should pay Rs.200 on account of damages to the plaintiff within three months but if the defendant failed to pay the said amount within the said time, the plaintiff should get a decree for the whole amount claimed, viz., Rs.3,000, and (iii) that the parties should bear their own costs.

3. The plaintiff now refuses to file the said compromise in court.

(w) The compromise should be in writing and signed by the parties. Before recording a compromise the court is not only entitled but bound to examine it and determine whether it embodies a lawful agreement or compromise (*Syed Abdul Ali* v. *Mirza Viqar Ali Beg*, 1947 OWN 595, 23 Luck 77).

The word "lawful" in Order 23, Rule 3 means agreements which in their terms are not unlawful (*Puttulal* v. *Dhiraj Sumer*, A 1963 Raj 63) and includes agreements which are voidable at the option of one party. If the court is satisfied that the agreement was in fact made, it must record it. It is not open to the court to enter into an enquiry as to whether it was brought about by fraud, misrepresentation, coercion or undue unfluence (*Union of India* v. *Raghbir Saran*, A 1957 All 120; *Quadri Jahan Begum* v. *Fazal Ahmad*, A 1928 All 494 DB; *Hasan Yar Beg* v. *Radha Kishan*, A 1935 All 137; *Suraparaju* v. *Venkataratum*, A 1936 Mad 347; *Kuppu Swami* v. *Pavarnambal*, A 1950 Mad 728; *Western Electric Co.* v. *Kailash Chand*, A 1940 Bom 60; *Harbans Singh* v. *Bawa Singh*, A 1952 Cal 73; *Ram Asrey* v. *Rameshwar Prasad*, A 1961 All 529).

If any party denies having entered into the agreement, the court must enter into this question and give its finding (*Mst. Kalpa* v. *Sita Ram*, A 1955 All 187). The court has no power, except when a party is a minor, to inquire into the fairness or unfairness of the terms (*Surapparaju* v. *Venkatarathnam*, 161 IC 728, A 1936 Mad 347, 1936 MWN 199).

The defendant prays that the said compromise be recorded and a decree be passed in accordance therewith.

No. 41—Application for Security for Costs [O.25, R.1](x)

For the reasons disclosed in the annexed affidavit, the applicant prays that the plaintiff be ordered to furnish security for the payment of all costs incurred, and likely to be incurred, in the defence of this suit by the applicant.

Affidavit

1. I make oath and say that the plaintiff is resident of Pakistan.

2. I make oath and say that the plaintiff has no property in India, except some furniture in the house which he has rented for his temporary residence at Agra.

3. I make oath and say that the said furniture is worth about Rs.200, while the costs already incurred by the defendant amounts to Rs.470.

4. I make oath and say that the plaintiff's claim is frivolous and is without any merits.

5. I make oath and say that the suit has been filed at the instigation of Chandra Kishore and Lachmichand of Agra, simply to harass the defendant. The said persons are financing the plaintiff.

(x) Security for costs can be demanded (1) when the plaintiff or plaintiffs reside out of India and have no sufficient property in India other than the one in dispute. A party who leaves India under such circumstances as to afford reasonable probability that he will not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of India for this purpose. Security cannot be demanded in all such cases but can be demanded only in exceptional cases, e.g., when the real plaintiff is some one else and he has brought the suit in the name of person who has no means, or when it is shown that such order is essential for the protection of the defendant (*Cellular Clothing Co.* v. *Sen Abdool & Co.*, ILR (1938) 1 Cal 688, 42 CWN 270). The court is entitled to look into the *prima facie* merits of the case before passing such an order, and no order will be passed if the plaintiff has a good *prima facie* case and the defendant has apparently no defence. If the suit appears to be frivolous and not to have been filed *bona fide*, e.g., when it is filed with the sole object of delaying another suit or execution proceeding, an order for security will be passed if the other conditions of the rule are fulfilled.

No. 42—Application for Appointment of a Guardian *ad litem* of a Minor Defendant (O.32, R.3) *(y)*

For the reasons disclosed in the annexed affidavit, the plaintiff prays that Bishan Lal, son of Ramlal, resident of 10, Civil Lines, or some other fit and proper person, be appointed as the guardian *ad litem* of Kishan Lal minor defendant in the case.

Affidavit

1. I make oath and say that Kishan Lal defendant is a minor, his age being about 10 years.

2. I make oath and say that the said Kishan Lal has no guardian appointed or declared by any authority.

3. I make oath and say that the father of the said Kishan Lal is the mortgagor under the mortgage which is the basis of this suit and is himself a defendant as such mortgagor, and his interest in the matter of controversy in this suit is, therefore, adverse to that of the said Kishan Lal.

4. I make oath and say that the said Kishan Lal has no other natural guardian.

5. I make oath and say that the said Kishan Lal lives in the care of his father.

(y) A court is bound to appoint a guardian for a minor defendant and the absence of such appointment nullifies the decree (*Baraik Ram* v. *Chowra*, A 1938 Pat 97, 173 IC 644, 19 PLT 259; *Tajuddin* v. *Khambatta*, A 1938 Lah 515, 40 PLR 857; *Talib Ali Shah* v. *Piarey Lal*, 1930 ALJ 938), and an application by the plaintiff is not absolutely necessary, though one is usuallly made; and becomes necessary, so as to inform the court about the proper person to be appointed as a guardian. An affidavit should be filed with such an application, in which the following points should be stated:

(1) That the defendant is a minor and his age, as that is required to determine whether the notice should or should not be issued to him;

(2) The name and address of any person appointed or declared by any authority to be the guardian of the minor;

(3) If there is no such person, a statement to that effect, and the names of natural guardians;

(4) If there is no natural guardian, a statement to that effect, and the name of the person with whom the minor actually lives;

(5) That the proposed guardian is a fit and proper person to act as guardian;

(6) That he has no interest in the matter in controversy in the suit adverse to that of the minor.

6. I make oath and say that Bishanlal is the elder brother of the said Kishan Lal and is a fit person to be appointed as the guardian of the said Kishan Lal.

7. I make oath and say that the said Bishanlal has no interest in the controversy in this suit adverse to that of the said Kishan Lal.

No. 43—Application to Sue as Indigent Person O. 33, R. 2 *(z)*

Draw up the plaint in the usual form, and add the following as the last paragraph before prayer for relief :

The plaintiff is not possessed of means sufficient to enable him to pay the court-fee prescribed by law for this suit (other than property exempt from attachment in execution of a decree and the subject matter of the suit) and therefore prays for permission to sue as an indigent person. The immovable and movable property owned and possessed by the applicant is specified in schedule A and B respectively at the foot of the plaint.

(z) A list of movable and immovable property owned by the applicant with estimated value should be annexed to the plaint. If it is not annexed but the inventory is given in the plaint itself, it has been held to be sufficient compliance (*Lachmi Narain* v. *Bahadur Lal*, A 1942 Oudh 239). There is no separate application as in appeal, but the plaint itself is the application. A company or its liquidator can sue as a pauper i.e., indigent person (*Unioin Bank of India* v. *Khader International Construction*, A 2001, SC 2277; *Kundan Sugar Mills* v. *India Sugar Syndicate*, A 1959 All 540 FB; *Mathew* v. *Kerala United Corporation Ltd.*, A 1961 Ker 180; *Nagpur Elec. L & P Co.* v. *Shreepathirao*, A 1958 SC 658, para 14, approving the view in *Perumal* v. *Tirumdarayapuram*, A 1918 Mad 362 45 IC 164 DB. On rejection of the application, the plaintiff may pay the court-fee and the suit will be deemed to have been instituted on the date the application for permission to sue as indigent person was made (*Bhushan* v. *Kanai Lal*, 41 CWN 537, 170 IC 758, A 1937 Cal 241; *Lalta* v. *Avadh N. Singh*, 184 IC 443, 1939 AWR 222, 1939 OWN 920, A 1940 Oudh 59), but it has been held in Nagpur that if the plaintiff had not acted in good faith and had filed the application simply to gain time to arrange for court-free, the advantage of section 149 cannot be allowed to him (*Seth Ghasi Ram* v. *Mt. Acharaj Kuar*, 166 IC 796, A 1937 Nag 36). The Allahabad High Court has held that during the pendency of the pauper application or at the time of its rejection, court can grant time to pay court-fee. If no such order is passed, pauper application is, on rejection completely disposed of and court-fee cannot be paid so as to turn that application into a suit. Court cannot grant time after rejecting the application (*Devendra Kumar* v. *Raghuraj Bharti*, A 1955 All 154).

No. 44—Application for a Final Decree for Foreclosure *(aa)*

1. A preliminary decree for foreclosure in terms of O.34, R.2, was passed by this court in the above case on January, 14, 1995.

2. The said decree declared Rs.45,200 to be the amount due to the plaintiff on July 14, 1995, the date fixed for payment.

3. The defendants have not paid the said amount or any part thereof.

The plaintiff prays for a final decree directing that the defendants be debarred from all rights to redeem the mortgaged property, and ordering the defendant to put the plaintiff in possession of the said property, and for cost of this application.

No. 45—Application for a final Decree for Sale *(bb)*

1. A preliminary decree for sale in terms of O.34 R.4, was passed in the above case on December 15, 1994.

2. The said decree declared Rs.42,300 as the amount payable to the plaintiff on June 15, 1995, the date fixed for payment.

3. The defendant has not paid the said sum or any part thereof.

4. Rs.44,838 is now due to the plaintiff.

If during the pendency of the application the pauper dies, his legal representatives may either pay the court-fee or continue the application by proving that they themselves are paupers (*Mst. Latifunnissa* v. *Mst. Khairunissa*, A 1955 All 53).

(aa) The practice is to give a fresh list of mortgaged property, but it is not necessary to give it (*Chandra Shekhar* v. *Amir Begum*, 49 A 592), nor can such an application be rejected for wrong calculation of interest (*ibid*). Under O. 34, R. 3, even the defendant has to make an application without which final decree cannot be passed in his favour if he pays off the decree. Final decree is passed on the basis of preliminary decree and court cannot go behind the latter. For example, if a defendant dies and his sons are added, the latter cannot challenge the preliminary decree on the ground that the mortgage was without legal necessity (*Ram Ugrah* v. *Ganesh Singh*, A 1940 All 99).

(bb) A written application is not necessary but court may pass a final decree on the oral application of the decree-holder (*Sitaram* v. *Lakshman Rao*, A 1926 Nag 152). Adjustment or payment after preliminary decree can be pleaded by defendant even though not certified (*Madan Theatres* v. *Din Shah*, A 1945 PC 152).

Particulars :

	Rs.
Amount entered in the preliminary decree	42,300
Interest from June 15, 1995 up-to-date	2,538

The plaintiff prays for a final decree for sale of the property in terms of O.34, R. 5(2) for Rs. 44,838, with further interest from the date of this application to the date of realisation, and costs of this application.

No. 46—Application under O. 34, R. 6 *(cc)*

1. In execution of the decree for sale under O.34, R.5, in the above case the whole of the property directed to be sold has been sold.

2. The net proceeds of the sale of such property have been found insufficient to pay the amount due to the applicant and Rs._____, is still due to him as per account given below.

3. The suit on which the decree for sale was obtained was instituted by the applicant on September 20, 1995 on foot of a mortgage of May 15, 1990.

4. Of the two executants of the said mortgage-deed Ram Prasad is dead, and opposite party Nos.2 to 4 are his sons.

The applicant prays that a decree for Rs._____ be passed against opposite-party No.1 and the assets of Ram Prasad deceased in the hands of opposite party Nos.2 to 4.

(cc) This application can be made only if the suit had been brought within limitation for a personal decree, but a personal decree for costs can always be made (*Dost Md.* v. *Miraj Din*, 163 IC 100, A 1936 Lah 387). The whole of the mortgaged property must be exhausted before applying for a personal decree, but if the property is not available for sale, a personal decree can be applied for (*Makhan Sahu* v. *Kumarunnissa Bibi*, A 1938 Pat 525, 17 Pat 538, *Ganeshwar* v. *Harish*, A 1940 Pat 616), but not if the part of the property is not available by reason of the decree-holder's own act of releasing it in favour of one of the heirs of the mortgagor (*Ulfat Husain* v. *Girdhari Lal*, 166 IC 673, A 1937 Oudh 252). An application under the rule will lie even when defendant's sons have got the mortgage decree and consequent sale set aside and purchase money has been returned to the auction purchaser (*Badal Singh* v. *Debi Saran*, 49 A 506). The question whether the plaintiff

No. 47—Application for a Final Decree for Redemption by the plaintiff under O.34, R.8 (1)

1. A preliminary decree for redemption was passed by this court in the above case on January 14, 1995 directing the plaintiff to pay Rs.42,345 on or before July 14, 1995.

2. The plaintiff has paid into court the said sum on July 10,1995.

The plaintiff prays that a decree be passed in terms of O.34, R.8 (1) ordering the defendant to deliver up the documents referred to in the preliminary decree (namely, ...) and to put the plaintiff in possession of the mortgaged property.

No.48—Application by Defendant for Decree under O.34, R.8 (2)

1. *Same as in the previous precedent.*

2. The plaintiff has not paid the said amount or any part thereof.

The defendant prays that a decree for sale of the mortgaged property for the realisation of the said amount and costs of the application be passed in terms of O.34, R.8 (2) (*or*, that a decree be passed that the plaintiff and all persons claiming through him be debarred from all rights to redeem the mortgaged property and ordering the plaintiff to put the defendant in possession of the mortgaged property and to pay the costs of this application).

No. 49—Application for Arrest Before Judgment O.38, R.1 *(dd)*

1. The facts disclosed in the annexed affidavit afford a reasonable probability that the plaintiff will, or may delay the execution of any decree

should get a decree under O. 34, R. 6 is to be considered when such an application is made and not during the pendency of the original suit as the preliminary decree only reserves to the plaintiff a right to make an application for a personal decree. In fact, even if there is no such reservation in the preliminary decree in the orginal suit, that will not bar the plaintiff's right to apply after the sale of the mortgaged property (*Gopalswami* v. *D.Narayanaswami*, A 1944 Mad 65, 211 IC 630) But if a claim for personal decree is made and rejected on merits a subsequent application for it will not lie (*Md. Huzabar* v. *Abdul F. Khan*, 1936 ALJ 1228, 1936 AWR 1033). Limitation is 3 years under Article 137 and time runs from the date of final confirmation of sale of mortgaged property (*Jagrup* v. *Ram Gati*, 168 IC 673, A 1937 All 285).

(dd) Arrest before judgment cannot be granted except on a very strong case being made out by the plaintiff. The case should fall under O. 38, R. 1. An intention

that may be passed against the defendant in this case.

2. The plaintiff prays that a warrant be issued for the arrest of the defendant, and on the defendant being brought to court, such order about deposit of money or security or imprisonment of the defendant in the civil prison may be passed as may appear to the court to be just and sufficient to safeguard the plaintiff's interest in the suit and under the decree that may be passed.

Affidavit

1. I make oath and say that the defendant was served with summons in the above case on July 10, 1995.

2. I make oath and say that, on the night of the same day, July 10, 1995, the defendant sent all his household effects, jewellery and cash, with his family, to London.

3. I make oath and say that I am informed by Babu Lal, Head Clerk of Messrs Green and Co., in whose office the defendant is employed, and I verily believe it to be true, that the defendant has given a notice to his said employers to leave their service at the end of the month of July, 1995

4. I make oath and say that I am informed by Bodhu, son of Jhamu employed as the defendant's cook, that the defendant is intending to leave India and to go to London at the end of this month.

No. 50—Application for Attachment before Judgment O.38, R.5 *(ee)*

1. For reasons disclosed in the annexed affidavit, the plaintiff prays that the defendant be ordered to furnish such security as the court thinks proper and, on his failure to do so, following property be attached.

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to delay the plaintiff or to avoid any process or to obstruct or delay the execution of the decree is essential in a case under Clause (a) and a reasonable probability that the plaintiff will or may be obstructed in the execution of his decree is a necessary element of a case under Clause (b). Such intention or probability must be clearly shown by facts and, unless this is shown, no application for arrest can be granted.

An application for arrest should be supported by an affidavit, as generally there are no other materials on the record, which may show these facts.

(ee) This is also granted only on very strong grounds, and an intention to delay or obstruct the execution of any decree that may be passed must be estab-

2. As there is a danger that the said property may be soon disposed of by the defendant, the plaintiff further prays that, pending final orders of the court, the said property may be conditionally attached.

Details of property *Value*

* * * *

Affidavit

1. I make oath and say that the summons in this case was served on the defendant on June 10, 1995.

2. I make oath and say that the defendant has no other property except that specified below:

Property

* * * * *

3. I make oath and say that the defendant has, after the receipt of summons, made negotiations with Ramlal of Karori village, for the sale of the said property.

4. I make oath and say that I am informed by Santlal patwari of village Karori, and I verily believe it to be true, that Ramlal has paid Rs.10,000 as earnest money to the defendant and the latter has agreed to execute a sale-deed in favour of the said Ramlal in the course of a week.

5. I make oath and say that I am informed by the said Santlal, and I verily believe it to be true, that the defendant had told the said Santlal to have the sale-deed executed without unnecessary delay and that on being asked the cause of the haste, the said defendant told the said Santlal that the plaintiff had instituted a suit against him, and that he apprehended that the whole property would be swallowed up by the decree of the plaintiff.

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lished before an attachment order can be obtained. The bare fact that the defendant has transferred a portion of his property or is about to transfer some property is no ground, for that may have been done to pay off his other debts or to meet his immediate or necessary expenses. Unless the motive of a proposal to transfer his property is shown to be delay or obstruct the plaintiff's decree, no order for attachment can be passed. The remarks about the necessity of an affidavit made in the last note apply here also (see also *Palghar Rolling Mills* v. *V.I.Steel Ltd.*, A 1985 Karn 282).

No. 51—Application for Temporary Injunction *(ff)*

For reasons disclosed in the annexed affidavit, the plaintiff prays that the defendant No.1 be restrained by a temporary injunction from selling the property specified below in execution of his decree No.140 of 1995 passed by the Subordinate Judge, First Class, of Ahmedabad.

List of Property

* * * *

Affidavit

1. I make oath and say that I am the owner of the property which is put up to sale in execution of decree No.140 of 1995 passed by the Subordinate Judge, First Class, of Ahmedabad, and that Anand Chand, judgment-debtor, has no right or interest in the said property.

2. I make oath and say that November 14, 1995, is the date fixed for sale.

3. I make oath and say that the property consists of my favourite furniture and some rare pictures.

4. I make oath and say that no amount of money can compensate me for the loss of the said property.

(ff) O. 39, R. 1 and 2 lay down the cases in which a temporary injunction can be granted. It does not, however, follow that an injunction will, as a matter of course, be granted in all cases, but it must be understood that the grant of an injunction being always discretionary, it cannot be granted unless it is shown that a substantial, serious, immediate and almost irreparable injury will result if it is not granted. A person seeking temporary injunction must satisfy the court on the follwing three points viz. (i) prima facie case (ii) irreparable injury and (iii) balance of convenience. (*Priya Rubber & Plastic Industries* v. *Bajrangobati Industries*, 1995 AIHC 3680 (All) (DB); *Shyama Kishore Bal* v. *Kishore Talkies*, 1995 AIHC 3096; *Dalpat Kumar* v. *Prabulal Singh*, A 1993 SC 278).

In no case will an injunction be granted to prevent a breach of contract, unless the contract is one which can be specifically enforced or the case is one for perpetual injunction. But it does not follow that in all cases in which specific performance or injunction can be granted by the decree, a temporary injunction will always be granted, for, to justify an injunction not only must the case be one in which an injunction is an appropriate relief, but there must be the further ingredient that unless the defendant is restrained forthwith by a temporary injunction, irreparable injury or incovenience may result to the plaintiff. Mere inconvenience cannot be said to be irreparable injury (*Secretary, Civil Stn. Sub-Commitiee, Nagpur*

No. 52—Application for Punishment for Disobedience or Breach of Injunction (O. 39, R. 2 A)

1. The plaintiff-applicant instituted suit No. 232 of 1994 *Ram* v. *Shyam*, pending in this court.

2. On the applicant's application, on January 2, 1996 the court granted temporary injunction restraining the defendant from proceeding further with the constructions on the land in suit. The said order has been passed by the court after hearing both the parties.

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v. *Govindrao*, 170 IC 239, A 1937 Nag 137). In a suit for declaration of title merely and neither for possession nor for perpetual injunction, a temporary injunction restraining defendant from interfering with plaintiff's possession will not be granted (*Sachindra* v. *Panchanon*, 94 IC 871, 30 CWN 214, A 1926 Cal 604 DB). An argument which is often advanced in support of an application for injunction is that the injunction will cause no harm to the defendant. That is no consideration and can be no ground for the grant of an injunction (*Gopalji Jha* v.*Gajendra*, 162 IC 210, A 1936 Pat 226). The applicant must, therefore, make out from his application or affidavit, not only a case within the scope of rule 1 or 2 but also a strong case of some substantial and irreparable injury to him. Plaintiff must come with clean hands, before injunction can be granted (*Shajuddin* v. *Nagar Palika*, A 1985 MP 252; *Penguin Books* v. *India Book Distributors*, A 1985 Del 29; *Gujrat Bottling Co. Ltd.* v. *The Coco Cola*, JT 1995(6) SC 3, A 1995 SC 2372). Normally interim injunction is not granted so as to award substantially the same claim as claimed in the suit, e.g., possession, but there is no absolute bar to it (*Indian Cable Co.* v. *S. Chakeraborty*, (1985) 89 CWN 559). The courts should not pass an interim order the effect of which is to grant a relief which can be granted by the court only at the time of final disposal of the case (*P.R.Sinha* v. *Inder Krishan Ram*, (1996) 1 SCC 681)

An injunction will never, unless in very exceptional cases which must be rare, be granted to restrain a public functionary from doing his duties. A pleader should refuse to apply for a temporary injunction unless there are very substantial grounds for the application. It is also his duty to warn the client of the provisions of section 95 C.P.C. before making an application which does not appear to him to be fully justified. No injunction can be granted against the true owner at the instance of a person in unlawful possession. 'Public interest, is one of the material and relevant consideration in either exercising or refusing to grant an interim injunction (*Khimjibhai Haribhai Bharwad* v. *State of Gujarat*, 1995 AIHC. 2142 (Guj.) DB). The Courts, in the cases where injunctions are to be granted to restrain public projects, should necessarily consider the effect on public purpose thereof and award suitable damages (*Mahadeo Savlaram Shelke* v. *Pune Municipal Corpn.*, (1995) 3 SCC 33 at pp. 41, 42).

Apart from O. 40, the court has inherent power to pass an order for providing for protection and security of the suit property. Therefore the court can, under this

3. Inspite of the court's injunction order, the defendant has further raised the constructions and thus has disobeyed the court's injunction order and is liable to be punished under O.39, R.2A.

It is, therefore, prayed that the defendant be punished for disobeying the court's injunction order, his property detailed below be attached and he be also detained in civil prison.

No. 53—Application for Appointment of a Receiver in a Suit for Possession *(gg)*

For reason disclosed in the annexed affidavit the plaintiff prays that a receiver of the property specified below be appointed, that the defendant be removed from possession of the said property, and that the same be committed to the charge of the receiver, to be managed by him under the directions of the court until the final disposal of the case, or until further orders and that such further and other orders be made as the court think just and proper.

Details of Property

* * * *

Affidavit

1. I make oath and say that one Sant Lal was the owner of the property in dispute in the above noted case.

2. I make oath and say that the said Sant Lal executed a will on July 24, 1984, bequeathing the said property to me and deposited the said will in the office of the District Registrar of Agra.

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power, issue an injunction before the question of pauperism is decided and the suit is registered (*Matuki Mistry* v. *Kamakshaya Pd.*, A 1958 Pat 264; *Ram Khelawan* v. *Sudama Devi*, A 1964 All 366). Court has also inherent power to stop abuse of process, e.g., to issue an injunction to restrain defendant from prosecuting a suit instituted in a court different from that agreed in the contract (*Firm Bicharam* v. *Firm Baldeo Sahai*, A 1940 All 241).

(gg) See O. 40, R.1. This is also an order which can be passed only in very exceptional cases. If the defendant is in possession of property claimed by the plaintiff, he cannot be dispossessed unless it is shown that the plaintiff has a *prima facie* title as against the defendant, that the defendant is mismanaging the property, and that there is a danger that the value of the property will be reduced by the time the suit is decided (*Bidurramji* v *Kehoramji*, 1938 AWR 127, 1938 OWN 1153, 178 IC 725 PC; *Amar Nath Gupta* v. *Om Prakash Verma*, 1994 LCD 1154 (All) DB).

3. I make oath and say that the said Sant Lal died in November, 1995.

4. I make oath and say that I was in England from September, 1995 to September, 1996, studying for the bar.

5. I make oath and say that on the death of the said Sant Lal, the defendant obtained possession of the said property on the ground of his being a distant kinsman of Sant Lal.

6. I make oath and say that since the defendant has obtained possession, he is mismanaging the property and reducing the value of the *corpus* of the said property.

7. I make oath and say that I have learnt from the copies of the *pattas* and of village papers, and I verily believe that the information contained in them is true, that the defendant, in July 1996, granted 24 years's *pattas* to the following tenants at half the generally prevalent rents : Achbal, Badam, Hukmi, Sattar and Subhan.

8. I make oath and say that I have been informed by Chaudhri Lalsingh, *mukhia* of the village Rekra, and I verily believe it to be true, that the defendant has cut down trees worth Rs.6,000 in the said village Rekra.

9. I make oath and say that I have been informed by my advocate, and I verily believe it to be true that it is likely to take about two years to dispose of the case in this court and another three years to dispose of the appeal in the High Court.

Specific acts of mismanagement should be alleged, and *prima facie* established (*Manavedan* v. *Manavedan*, 164 IC 857, A 1936 Mad 817). Mere existence of an apprehension in the mind of the plaintiff is not sufficient (*Hari Kishan Lal* v. *Peoples Bank of Northern India*, A 1935 Lah 102). Mere poverty of the defendant is no ground for dispossessing him of the property of which he has been in long possession (*Shivaji* v. *Aishwaryanandji*, 29 MLT 209, 29 IC 485), but if disputes arise between the parties immediately on the death of the owner, and something can be said in support of the claim of each party, it is a good case for appointment of a receiver. The criterion is whether the appointment is convenient *as well as* just. The main object should be the preservation of the property, but no order should be made if injustice would be caused to the other party (*Har Gopal* v. *Deomiti*, A 1945 Pat 404). Receiver can be appointed in case of a suit on a simple mortgage, either before or after the preliminary decree (*Damodar* v. *Radhabai*, 40 BLR 1266; *B.Banerji* v. *S.S.Singh Deo*, 1947 ALJ 10; *J. Kishanlal* v. *A Rathan Singh*, A 1954 Mys 162;

No. 54—Ditto, In a Suit for Partition

Alternative form, in which allegation's are made in detail in the petition

1. That the above-mentioned suit is for partition of the joint family properties of the plaintiff and defendants.

2. That the defendant No.1 is the uncle and defendants 2 and 3 are the cousins of the plaintiff.

3. That ever since the death of the applicant's father, defendant No.1 has been managing all the joint family properties as *Karta* of the family.

4. That the average net annual income of the said properties is about Rs.1,25,000.

5. That in April last, owing to certain differences arising from defendant No.1 refusing to allow proper clothing and pocket expenses to the applicant and ill-treating his wife, the applicant had to remove himself from the family dwelling house to a rented house at .....and has since been living separately from the defendants.

6. That the applicant has no other source of income except the joint family property which is in the exclusive possession of defendant No.1.

7. That the defendant No.1 has refused to allow the applicant anything for his maintenance and the applicant is living on money borrowed from other relations.

8. That the partition suit is likely to take several years in disposal.

9. That in the circumstances stated above it is just and convenient that a receiver should be appointed of the said joint family properties.

It is, therefore, prayed that:

(a) A receiver be appointed of the joint family properties detailed in

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Muniammal v. *Pagadala Gurwayya Naidu*, A 1960 Mad 195; *Onkarlal Radha Kishan* v. *V.S.Rampal*, A 1961 Raj 179). It can , however, be granted only by the court in which the proceeding is pending and cannot, therefore, be granted by the court passing a preliminary decree when an appeal is pending against that decree in another court (*Chidambaram* v. *Perthaperumal*, 168 IC 80, A 1937 Mad 163).

For authorities and case law on appointment of Receiver in case of partnership disputes see *Saroj Rani* v. *Krishna Swarup*, 1984 ALJ 1003; *Tilak Chand* v. *Darshan Lal*, A 1985 J& K 50.

the plaint pending the disposal of the suit or until further order;

(b) Defendant No.1 be directed to hand over to the receiver all the said properties and such other joint family property as may be found in his possession, together with all documents, books of accounts and papers relating to the said joint properties.

(c) The receiver be directed to pay to the applicant a sum of Rs.1,000, to liquidate the debts incurred by the applicant for his maintenance and expenses of the suit.

(d) The receiver be directed to pay to the applicant monthly Rs.500 on account of house rent and Rs.750 on account of expenses or such other sums as the court may think fit and reasonable until the disposal of the suit.

(e) Such other orders be made as the court thinks fit and reasonable.

No. 55—Application for Stay of Execution Pending Appeal (made to the Court Passing the Decree) under O.41, R.5 (2)

1. The applicant wishes to file an appeal from the decree in the above case.

2. The applicant is ready to give security to the satisfaction of the court for the due performance of such decree or order as may ultimately be binding upon him.

For the reasons disclosed in the annexed affidavit the applicant prays that the execution of the decree be stayed pending disposal of the appeal from the said decree.

Affidavit

1. I make oath and say that I have applied for copies of judgment and decree in this case for appeal, but the same have not yet been delivered to me.

2. I make oath and say that the plaintiff has put his decree in execution and has prayed for demolition of my house in execution of the said decree.

The affidavit accompanying an application for appointment of receiver should make out a strong case, and should give full particulars, with instances, if necessary, of all charges laid against the opposite party.

3. I make oath and say that a reconstruction of the house will cost at least Rs.5,000 and the materials of the demolished house will be worth not more than Rs.1,500.

4. I make oath and say that I shall be rendered homeless and it will be very difficult for me to procure another house before the next rainy season is over.

No. 56—Application for Stay of Execution Pending Appeal (made to the Appellate Court) under O. 41, R. 5 (1)

For reasons given in the annexed affidavit, the appellant prays that execution of the decree appealed from be stayed pending disposal of this appeal. The appellant is prepared to furnish security to the satisfaction of the court for the due performance of such order or decree as may ultimately be binding upon him.

Affidavit

1. I make oath and say that the respondent has put the decree appealed from in execution in the court below five days ago and has prayed for demolition of my house.

2. I make oath and say that the lower court has issued an order to the Amin to demolish my house.

No. 57—Application for the Review of Judgment *(hh)*

The above-named defendant begs to present this application under O.47, R.1, for review of the judgment, dated November 14, 1995, in the above case for which no appeal is allowed by law (*or*, from which no appeal has been preferred) and sets forth the following grounds for review, namely:

1. That the applicant has, on May 12, 1996, discovered among the papers of Ram Ratan deceased, new and important evidence, to wit, a

(hh) Such application shall be in the form of a memorandum of appeal (O. 47,R. 3). An affidavit is generally filed in support of the ground of review. The application need not be verified. Fraud or undue influence, unaccompanied by the discovery of new matter is no ground for review of even a compromise decree (*Nathu Lal* v. *Raghubir Singh*, 23 ALJ 1029, A 1926 All 50 DB).

A party, who was not impleaded in a proceeding, can file a review application on the ground that he was not heard before passing of the order adverse to him (*Surendra Kumar* v. *XIth Addl. District Judge, Kanpur City*, 1995 (1) ARC 313 All).

diary kept by the said Ram Ratan deceased containing an entry about the birth of the applicant.

2. That the said diary was not, in spite of the exercise of due diligence, within the knowledge of the applicant at the time the decree was passed.

3. That the said diary would have altered the finding of the court about the legitimacy of the applicant, on which finding the decree, sought to be reviewed, had been passed.

(*Or*, 1. That the plaintiff had, on the date of issues, (i.e., June 16, 1995), admitted that Saruplal's share in the house mentioned at No.12 in the list of the property in suit was only one-half and the other half belonged personally to the defendant-applicant.

2. That on the finding that the plaintiff was, and the defendant-applicant was not, the heir of the said Saruplal, the court passed a decree for possession of the whole of the said house against the applicant.

3. That this is a mistake which is apparent on the face of the record).

(*Or*, 1. That the decree sought to be reviewed was passed on the ground that the Revenue Court of an Assistant Collector had passed a decree for the applicant's ejectment and the applicant's tenancy had thus been determined.

2. That the said decision of the Assistant Collector has on Appeal been set aside by the Additional Commissioner of the Allahabad Division, by an order passed after the decree of this court, that is, on February 25, 1996.

That relief sought by this application is to have the said decree set aside and the case re-heard and determined.

Where there is an error appparent on the face of the record, whether the error occurred on account of the Counsel's mistake or it crept in by reason of an oversight on the part of the court, is not a circumstance which can affect the exercise of jurisdiction of the court to review its decision (*Jamna Koer* v. *Lal Bahadur*, A 1950 FC 131). But rehearing of arguments cannot be claimed in the garb of review (*Thungabhadra Ind.* v. *Govt. of A.P.*, A 1964 SC 1372).

Limitation : Period of Limitation is 30 days from the date of judgment sought to be reviewed under Article 124 in cases other than judgments of Supreme Court.

No. 58—Application for Permission to Appeal as an Indigent Person (Pauper) (O.44, R.1) *(ii)*

1. The applicant begs to prefer an appeal from a decree passed against him in suit No.136 of 1996 by the First Class Subordinate Judge of Surat.

2. The applicant is not possessed of means sufficient to enable him to pay the court-fee prescribed by law for the memorandum of the said appeal.

3. The whole of the movable and immovable property owned and possessed by the applicant (other than property exempt from attachment in execution of a decree and the subject matter of the suit) with the estimated value thereof, is specified at the foot of this application.

The applicant prays that he may be allowed to appeal as an indigent person.

APPLICATIONS UNDER GUARDIAN AND WARDS ACT

No. 59—Application for the Appointment of Guardian of a Minor *(jj)*

1. The applicant desires to be appointed guardian of the person and property of the minors hereinafter named and described.

(ii) See Chaps. XVI and XVII, *ante*, for appeals generally and cf. precedent No. 43 ante if the applicant was plaintiff and had been allowed by the trial court to sue as indigent person that fact and the averment that he has not ceased to be indigent person since the date of decree should be added.

(jj) See section 10, Guardians and Wards Act (Act 8 of 1890). The application should be signed and verified as a plaint. A declaration of the willingness of the proposed guardian to act should be filed with the application. It should be signed by the declarant and attested by at least two witnesses. When the application did not bear attestation by two witnesses as required by section 10 (3), it deserves to be rejected *in limine (Rabindra Nath Mukerjee* v. *Abinash Chandra Chatterjee*, (1971) 76 CWN 48). The application may be made by the person desiring to be appointed or by any relative or friend of the minor or by the Collector. An application by the Collector may be in the form of a letter and may be sent by post. In a joint Hindu family the manager is the guardian and no other guardian can be appointed (*Raja Ram* v. *Rameshwar*, 161 IC 605, A 1936 Cal 270; *Jagannath* v. *Chunilal*, A 1940 All 416, 1940 ALJ 511), except for separate property of the minor (*Sadhuram*

2. The particulars required by section 10 of the Guardians and Wards Act are as follows :

(a) Name of the minors	1. Rameshwar Singh 2. Km. Rajkali
Sex	1. Male 2. Female
Date of birth	1. June 8, 1988. 2. August 10, 1990.
Ordinary Residence	Village Rupa, Tahsil Shahgunj, District Jaunpur

(b) The petitioner, Ram Prasad, is the younger brother of the deceased father of the minors.

(c) The nature, situation and approximate value of the minor's property is shown is Schedule A, annexed to this application.

(d) Smt. Shama of village Rupa has the custody of the person of Rameshwar Singh and Raj Kali minors. The said Smt. Shama is in possession of the property of the minors.

(e) Names and residence of the near relatives of the minors	1. The applicant. 2. Smt. Shama, mother's sister of the minors, resident of village Rupa. 3. Ram Kishen, mother's brother of the minors, resident of Shahgunj, District Jaunpur.

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v. *Prithi Singh*, 161 IC 861, A 1936 Lah 220). If a guardian has been appointed, court cannot appoint another without the former's removal (*Abdul Qadir* v. *Mt. Fatima*, 41 PLR 12). Section 17 of the Guardian and Wards Act gives the court a very wide discretion. Whenever the court finds that it is for the welfare of the minor that certain person should be appointed gruadian the court can exercise its jurisdiction and appoint such a person as guardian (*Haliman Khatoon* v. *Ahmadi Begum*, A 1949 All 627). The welfare of minor is paramount consideration before the court for appointing a guardian for the person of the minor (*Thrity Hoshie Dolikuka* v. *Hoshiam Dolikuka*, A 1982 SC 1276); *Ahmad Shareef Khan* v.

(f) No guardian of the person or property of the minors has been appointed.

(g) So far as the applicant knows, no application for such appointment has ever been made before.

(h) The application is for the appointment of a guardian of the person and property of the minors.

(i) The applicant is the uncle (father's brother) of the minors. He is the only male relative of the minors in the village. He is an educated man and looks after and manages his own property also, which is of considerable value. He can personally manage the property of the minors with advantage to the minors. He can look after the education of the minors much better than their old aunt, Smt. Shama.

(j) The application has been made because the education of the minors is being neglected and the property is managed by Smt. Shama through her *Karinda*, Abdul Karim, who has not been properly managing

Farhat Sultana Begum, 1995 ALR 266 (All); *Joyce Mauria Jacobs* v. *Basil Genald Jacobs*, 1996 (2) CCC 21 (Cal) DB; *Meera Devi* v. *Shyam Sundar*, A 1985 Ori 65; *Kumar v. Jahgirdar* v. *Chetana K. Ramatheertha*, A 2001 SC 2179). The mere fact that mother has contracted a second marriage after the death of minor's father with a stranger should not stand in the way of her appointment as guardian provided the welfare of the minor so demands (*Sundari* v. *Mohd. Fato*, A 1971 J & K 43). The court should act consistently with personal law of the parties and with due regard to welfare of minor. On the death of father of the minor who is a Muslim, the grand father is the most suitable person although the grand father had three wives and a number of children (*Syed Sadmir Ali* v. *Syeda Chandubanu Begum*, A 1973 Gauhati 103). Even dictates of personal law must be subordinated to consideration of the welfare of the minor (*Kalimunnisa* v. *Shah Salim Khan Rehmankhan*, 1976 MPLJ 621). Under Mohamedan Law the mother is entitled only to the custody of the person of her minor child up to a certain age according to the sex of the child. But she is not the natural guardian; the father alone, or, if he be dead, his executor is the legal guardian (*Mustt. Rahima Khatoon* v. *Mustt. Saburjanessa*, (1995) 3 GLR 201 Gauh). Unless there is evidence to show that the natural guardian is not a fit person to be appointed as guardian of minor, the court would ordinarily accept his claim in preference to the claim of any other person (*C.Madhavan Nair* v. *M. Viswanathan*, 1977 KLT 479). Under proviso to section 6, Hindu Minority and Guardianship Act, a person forfeits his right to be legal guardian if he ceases to be a Hindu (*Onkar* v. *Urmila*, A 1985 HP 100). So long a guardian can provide a comfortable and a happy home for the minor, she can be given custody of the minors even though she has become convert to a different faith (*Sheila Umesh*

it, and profits have decreased since the death of the minors' father. Besides, there are some debts due from the said father, interest on which is increasing. The applicant wants to pay up these debts by selling a portion of the property.

The applicant prays that he be appointed guardian of the person and property of the said minors.

No. 60—Application for Appointment of Guardian for Inter-country Adoption under section 7

The petitioners beg to submit as follows—

1. The petitioner No.1 is a Social and Child Welfare agency, recognised and licensed by the Government of India, having its premises at Lucknow. The petitioner society is busy in looking after the welfare of the abandoned and destitute children and also offer the child for adoption, including the one for inter-country adoption.

2. One child named Km. Savita in the care and custody of the petitioner society, was born on 23.3.1993 out of wedlock (illegitimate). The child was, therefore, handed over to the first petitioner to be brought up.

3. The petitioner No.2, Mr. Armando Francesetti, a citizen of the United States of America, was married with Petitioner No.3 Mrs Entrice Munini Francessetti in the year 1985. Unfortunately, out of the marital relations no child has been born to the petitioners No.2 and 3.

Tahiliani v. *Soli Phirozshaw Shroff*, A 1981 Bom 175). The welfare of the minor is the paramount consideration (*Thrity Hoshili* v. *Hoshiam*, A 1982 SC 1276; *Veena* v.*V.K.Kapoor*, A 1982 SC 792). The main and paramount consideration is the welfare of the child, and not the legal right of a particular party (*Veena Kapoor* v. *Varinder Kumar*, A 1982 SC 792; *H.S.Dolikuka* v. *T.C.Dolikuka*, A 1984 SC 410; *Pushpa Singh* v. *Inderjit Singh*, 1990 (Supp) SCC 53;*Chandrakala Menon* v. *Vipin Menon*, (1993) 2 SCC 6; *Gopal Prasad* v. *Angoori Devi*, 1991 ALJ 1041 All). Where the father has re-married, in spite of the better financial position of the father, the real mother was given the custody of the child (*Gopal Prasad* , supra).

A father being the natural guardian has a preferential right to the custody of his minor children. Where the mother had died, the children were soar about the ill-treatment meted out by their father to their mother, the minor children were allowed to remain with their natural uncle (*Kirti Kumar Maheshankar Joshi* v. *Pradip Kumar Karuna Shanker Joshi*, A 1992 SC 1247).

4. The petitioners No.2 and 3 desirous of adopting a child and for that purpose approached the petitioner No.1. Out of several children found in the said Society, the petitioners No.2 & 3 want to take child Km. Savita aged 3 years in adoption. The biological parents of the child are not known.

5. The home study report of the petitioners No.2 and 3 prepared by one Child Welfare Society situated in town Boston, United States of America and recent photograph of the family of the petitioners No.2 and 3 are also being filed. The petitioners No.2 and 3 have enough means to maintain the child, and in case of reapprochement, between the petitioners No.2 and 3 a suitable arrangement for the replacement of the child would be made.

6. The petitioners No.2 and 3 are eligible to take the child in adoption according to the law of the United States of America.

It is, therefore, prayed that the petitioner No.2 Mr Armando Francessetti be appointed guardian of the person of Km. Savita and be permitted to take the child to United States of America. Within a period of one year the petitioners No.2 and 3 would take the child in adoption. The petitioners shall be bound by such other directions as may be imposed by this Hon'able Court.

In matter of appointment of guardian of a minor welfare of the minor is the paramount consideration. The consent of the minor is not the sole guiding factor (*Mahadeorao* v. *Kisanrao*, A 1996 Bom 221). Ordinarily, custody should go to the natural guardian. It is only in extreme cases of illiteracy, poverty or delingency of the father that his claim to the custody of the child should be disregarded (*Lekhraj Kukreja* v. *Raymon*, A 1989 Delhi 246). Where the father adopts Muslim religion and marries a Muslim girl, he ceases to be a natural guardian as a matter of legal right (*Vijayalashmi* v. *Inspector of Police*, A 1991 Mad 243 DB).

In India, specially abandoned and destitute children are adopted by foreign couples. To check the malpractices indulged in by special organisations and voluntary agencies engaged in the work of offering Indian children in adoption to foreign parents, the Supreme Court took up the matter in *Lakshmi Kant* v. *Union of India*, A 1984 SC 469; *Laxmi Kant Pandey* v. *Union of India*, A 1984 SC 272; *Laxmi Kant* v. *Union of India*, A 1987 SC 232; *Laxmi Kant Pandey* v. *Union of India*, A 1992 SC 118; *K.S.Council for Child Welfare* v. *Society of Sisters of C.S.A Convent*, A 1994 SC 658; *S.C.Kamdar* v. *Asha Trilokbhai Saha*, A 1995 SC 1892, and laid down certain procedural safeguards in this regard. See discussion under Chapter XVIII-Applications or petitions, headnote "Guardianship of Unclaimed Children-Adoption. ante.

No. 61—Application for an Order Declaring the Applicant to be a Guardian *(kk)*

1. The applicant desires to be declared guardian of the minors hereinafter named.

2. The particulars required by section 10 Guardians and Wards Act, are as follows:

(a), (b) and (c) as in application No.59.

(d) The applicant has the custody and possession of the person and property of the minors.

(e), (f), and (h) as in application No.59.

(i) The applicant is the legal guardian of Km. Raj Kali, minor, under the Hindu law, and he has been appointed guardian of the person of Rameshwar Singh and of the property of both the minors by the will of the father of the minors, dated June 14, 1993. The applicant has been managing the said property and has been looking after the bringing up and education of Rameshwar Singh since the death of the said father of the minors in July, 1993.

(j) The property of the minors is under a mortgage, interest on which is increasing day by day, therefore, the said applicant wants to make some arrangement to pay it off by selling a small portion of property hence a certificate from the court is required.

The applicant prays that he may be declared to be the guardian of the person and property of the said minors.

In cases of inter-country adoption, in application by a foreign national for appointment as guardian of Indian child, the State Council for Social Welfare is a necessary party. The State should also be arrayed as party in such proceedings (*Society of St. Gerose Convent* v. *Kant State Council for Child Welfare*, A 1992 Kant 263 DB).

(kk) When a person is either the natural and *de facto* guardian of the minor as a father, or has been appointed by the will of minor's father, he may obtain a declaration by the District Judge that he is a guardian and then he will be in the same position as a guardian appointed by the District Judge, though in the case of a natural guardian, it is not necessary, as such declaration will not enhance his powers (*Sivasankar* v. *Radha Bai*, A 1939 Mad 611). He need not obtain a probate of the will before making the application (*Ganesh Ji* v. *Mt. Bhagirathi*, 163 IC 242, A 1936 All 368). Under Section 8 (3) of Hindu Minority and Guardianship Act 1956,

No. 62—Application for Temporary Protection of Minor's Property under section 12 *(ll)*

1. The applicant has made an application for his appointment as guardian of the property of Subhan Ali minor, and May 12, 1996 is fixed for hearing the said application.

2. Qurban Ali, the deceased father of the said Subhan Ali, has left, besides other property, a standing wheat crop which is quite fit for being reaped, and there is a danger of its being damaged if it is not reaped and stored without delay.

3. The applicant wanted to reap and store the crop for the benefit to the said minor but was obstructed by Karim Baksh and Qadar Baksh who are distant cousins of the said Qurban Ali.

4. The estimated value of the produce or the said crops is about Rs.8,000. The said Karim Baksh and Qadar Baksh are men of no means, and if they cut away the crops, as they intend doing, it will be impossible to realise the value of the produce from them.

The applicant prays that the said crop be placed in the temporary custody of the applicant or some other suitable person, so that it may be reaped and stored without unnecessary delay.

No. 63—Application under section 12 for Interim Protection of a Minor

1. The applicant is the mother's brother of Km. Jamna Kaur minor and has made an application for appointment of a guardian of the person of the said Km. Jamna Kaur.

2. The said Km. Jamna Kaur is a girl of 14 years of age and is at present living with her step-mother, Smt. Shama at village Raju Nagar.

3. The said Smt. Shama has betrothed the said Km. Jamna Kaur to one Rati Ram, son of Hari Ram, of village Kasora, and the marriage has been fixed for January 20, 1996.

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any agreement of sale concerning the property of a minor is voidable. The guardian has to obtain permission from the Court under Section 8 of the Act. (*V. Lakshmanan* v. *B.R.Mangalagiri*, JT 1995 (2) SC 105).

(ll) An application under this section can be made only after an application for appointment of guardian has been filed as the power under this section is

4. The said Rati Ram is an old man of 53 and is suffering from asthma and is in no case a fit and proper match for the said Km. Jamna Kaur.

5. Unless the said Km. Jamna Kaur is taken out of the custody of the said Smt. Shama, she will be married to the said Rati Ram on January 20, 1996, in violation of the provisions of the Child marriage Restraint Act.

The applicant prays that Smt. Shama be ordered to produce the said Km. Jamna Kaur before the court or at such place and time as the court considers proper, and be placed in the temporary custody of the applicant or some other near relation or other person as the court thinks fit, pending final orders for the appointment of a guardian of her person.

No. 64—Application by a Guardian for Permission to Sell the Property of the Ward

1. The applicant has been appointed guardian of the property of Ram Krishen Singh and Smt. Raj Kali by order of this court, dated November 24, 1995, in miscellaneous case No.400 of 1995.

2. The said property in subject to the debts specified in Schedule A at the foot of this application and the said debts are binding on the minor.

3. Interest of Rs.2,000 per mensem is accruing due on the said debts.

4. One of the creditors, Janki Prasad, is threatening to sue for the sale of the property mortgaged to him.

5. Of the three houses owned by the minors, one is sufficient for their residence and the remaining two are lying in a ruined condition and the minors have no income from them.

6. One Himmat Singh, son of Jaswant Singh, of Jaunpur offers Rs.3,15,000 for the said two houses and the price offered is fair and reasonable.

7. By the sale of these houses all the debts due from the said minors will be satisfied.

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ancillary to the appointment of guardian and the section does not give summary power to any court, where no application for appointment of guardian has been made.

The applicant prays permission to sell the said houses to Himmat Singh or to any other purchaser who might offer more than Rs.3,15,000.

APPLICATIONS UNDER INDIAN SUCCESSION ACT

No. 65—Application for a Succession Certificate *(mm)*

1. Jan Muhammad, son of Sher Muhammad of Lucknow, died on November 14, 1994.

2. The said Jan Muhammad ordinarily resided at the time of his death, at Varanasi, within the local limits of this court (*or*, the said Jan Muhammad owned a house and 2 shops in Dal-ki-Mandi in the city of Varanasi).

3. The following are the members of the family and near relatives of the deceased.

Names of relatives and members of family	*Address*
*	*
*	*
*	*

The applicant is the son and one of the legal heirs of the deceased.

5. There is no impediment to the grant of the certificate or to the validity thereof if it were granted, either under section 370 or any other provision of the Indian Succession Act or any other law.

6. The following are the debts and securities for which the certificate is applied for :

(mm) Such applications should be signed and verified as plaints (section 372). If the applicant is a minor, he must apply through a next friend (*Ram Kuar* v. *Sardar Singh*, 20 A 352; *Mahadeo* v. *Gangadhar*, 29 B 344; *Periah* v. *Lakshmi Devi*, 61 IC 797). No certificate can be granted for part of a debt (*Ghafur Khan* v. *Kalandari*, 8 ALJ 79, 33 A 327, 9 IC 127). A joint certificate may be granted to several claimants (*Daw Ohn Burnt* v. *Daw Saw*, A 1937 Rang 336, 172 IC 54). The right is a personal one and does not survive to the legal representatives (*Hamida* v. *Rabia*, 1937 AMLJ 40). Necessary fee prescribed by the Court-fees Act must be paid in cash along with the application (seciton 379). The court-fee need not be paid at the time of filing application for preparation of succession certificate, it can be paid at the time of issuance of certificate (*Usha* v. *State*, A 1993 MP 41 case-law discussed).

Debts

Serial No.	Name of debtor	Amount due on date of application	Description and date of instrument by which debt is secured
1	*	*	*
2	*	*	*
3	*	*	*

Securities

Serial No.	Distinctive No.	Name, title or class	Amount of par value	Market value on the date of the application
1	*	*	*	*
2	*	*	*	*
3	*	*	*	*

The applicant prays that a succession certificate be granted to him for collection of the debts and securities specified in para 6 above, (and the petitioner may further be empowered by the said certificate to receive interest or dividends on, and to negotiate or transfer, the said securities).

No. 66—Application for Extension of a Succession Certificate

1. The applicant was granted a succession certificate dated January 14, 1994, by this court in miscellaneous case No.54 of 1993.

2. The applicant prays that the said certificate may be extended to the following debts and securities.

Particulars of Debts and Securities

(To be given as in Precedent No.65)

In, application for grant of succession certificate the provision regarding disclosure of near relatives of the deceased is mandatory provision (*K.P.Narayana Reddy* v. *Alla Nagi Reddy*, A 1996 AP 198).

An application for succession certificate is made under section 372, Indian Succession Act (Act XXXIX of 1925). It should be made to the District Judge within whose jurisdiction the deceased ordinarily resided at the time of his

No. 67—Application for Revocation of Succession Certificate under section 383

1. In miscellaneous case No.41 of 1995, one Sher Muhammad was granted a certificate under part X of the Indian Succession Act of 1925 to collect the debts due to the deceased Jan Muhammad.

2. The case was decided *ex parte* on August 22, 1995.

3. The deceased, at the time of his death, left behind him the following relatives, namely

(i)

(ii)

(iii)

4. At the time of making the application the said Sher Mohammad fraudulently concealed the names and particulars of the relatives named above.

5. In the petition the said Sher Mohammad described himself as the sole surviving heir of the deceased.

6. The deceased was a Shia Mohammedan and according to Mohammedan Law of the Shia School your petitioner is a preferential heir to the estate of the deceased.

7. With the intention of keeping your petitioner in the dark, the said Sher Monammad fraudulently suppressed all the process of this court and made untrue allegations in his petition.

Your petitioner prays that the said certificate granted to Sher Muhammad be revoked.

No. 68—Application for Probate *(nn)*

1. The writing annexed is the last will and testament of Gopal Chandra

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death or if at that time he had no fixed place of residence, the District Judge within whose jurisdiction any part of the property of the deceased may be found.

The definition of the expression, "District Judge" as given in the Succession Act does not include a High Court which has not got original civil jurisdiction (*In re Rajendra Chandra Sen*, A 1934 All 958 DB; *in the matter of Sailendra Krishna Roy, A 1949 Pat 318*). It however includes an inferior court notified in this behalf by the State Government (section 388).

(nn) No probate is necessary for a Hindu unless the conditions mentioned

Chatterji, son of Shri Girish Chandra Chatterji and was duly executed by him in the presence of the witnesses named in the said will.

2. The testator died on January 4, 1994.

3. Your petitioner is the executor named in the said will.

4. The said testator have a fixed place of abode (*or*, has a house) at Hoogly within the jurisdiction of this court.

5. The amount of the assets which are likely to come to the hands of your petitioner is Rs.1,25,000, an account of which is given in Schedule A annexed to the affidavit filed with this petition. The amount of the liabilities and other lawful deductions of the said testator is Rs.1,11,000, an account of which is given in Schedule B annexed to the said affidavit.

Your petitioner prays that probate of the annexed will, may be granted to him.

No. 69—Application for Probate to have effect Throughout India

1-4. *Same as in the previous precedent.*

5. *Same as in the previous precedent-Then add-*

Of the assets aforesaid, assets of the value of Rs.1,20,000 are situate in the State of West Bengal within the jurisdiction of this court, and

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in section 57 Indian Succession Act exist; it is however obligatory in case of Christians (*Srinivasa* v. *K.V.S. Rao*, A 1986 Karn 9). The application for probate is made under Section 276, Indian Succession Act. It is to be signed and verified as a plaint and shall also be verified by one of the witnesses to the will in the form given in section 281, of the Act. The applicant should annex to the petition the will or in the cases mentioned in sections 237, 238 and 239, a copy, draft or statement of the contents thereof. Probate can be granted even if a part of the will is lost, provided evidence of its contents is forthcoming (*Kedar Nath* v. *Raj Kumar*, 185 IC 17, A 1939 Cal 674). Where the will does not name any executor or a legatee, universal or residuary, no probate can be granted. The proper course is to grant letters of administration with the will annexed to any legatee (*Soundararaja* v. *Florence Chellaiah*, A 1975 Mad 194). An affidavit shall also be filed with the application in the form given in Schedule III to the Court-fees Act. In Probate Court the validity of the provisions of the will cannot be questioned (*Mt. Laso Devi* v. *Mt. Jagatambha Devi*, 163 IC 656, A 1936 Lah 378). Probate Court has power to construe will in order to decide whether applicant has right to maintain application under sectoin 218 (as heir), section 232 (as universal or residuary

assets of the value of Rs.15,000 are situate in Uttar Pradesh within the jurisdiction of the Allahabad High Court and the District Judge of Varanasi.

6. To the best of your petitioner's belief, no application has been made to any court for a probate of the said will intended to have effect throughout India (*or*, in July 1994, application was made to the court of the District Judge of Varanasi by one Ram Lal Chatterji for grant of the probate of the said will to him, and the same was on November 15, 1995, dismissed on the ground that the said Ram Lal Chatterji was not appointed executor by the said will).

Your petitioner prays that probate of the annexed will, to have effect throughout the whole of India, may be granted to him.

No. 70—Application for Probate of Copy of a Will

1. Ram Lal of Calcutta, deceased, died on July 4, 1995, at Calcutta having made and duly executed his last will and testament bearing date July 20, 1992, whereof he appointed his sister, your petitioner, sole executrix.

2. At the time of the death of the said Ram Lal, the said will was whole and unrevoked and was in the same state as when executed but since the death of the said Ram Lal, the said will has been lost and cannot be found.

3. That during the lifetime of the said Ram Lal and at his request a copy of the said will was made by Ram Chandra Nag of Calcutta, Solicitor, and the same was examined by him with the original will and found to agree therewith.

4. Your petitioner believes the paper hereto annexed to contain the true last will and testament (being the copy thereof as aforesaid) of the said Ram Lal and your petitioner is the executrix named in the will.

5. *As in precedent No.68.*

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legatee) or section 334 (as other legatee: *Durgacharan* v *Bhudibala*, A 1985 Cal 264). Merely because natural heirs have been debarred under a will does not render a will suspicious but when a close relative of the executrix has played active part in the execution of the will, a hallow of suspicion is created about the voluntry character of the Will. However, if there is certificate of Sub-Registrar that the will was read over and the executant admitted the contents thereof, the circumstance that the witnesses are interested, loses significance

Your petitioner prays that the probate of the copy of the said will be granted to her limited until the original or a properly authenticated copy of the same is produced before the court.

No. 71—Application for Probate of Draft of a Will

1-2. *Same as in precedent No. 70.*

3. The said will was prepared by Amarnath Nag, Solicitor, who has preserved a draft of the same, which your petitioner has obtained from the said solicitor and annexes to this petition.

4. Your petitioner believes that the said draft contains a true last will and testament of the said testator, and your petitioner is the executrix named in the said will.

Prayer—*Same as in previous precedent, substituting the word "draft" for "copy".*

No. 72—Application for Probate of Copy of a Will when Original is Abroad

1. *Same as in precedent No. 70.*

2. That the said will was executed by the said Ram Lal when he was at London and the same was deposited by the said Ram Lal after execution thereof with Saunders & Co., Solicitors of London who still retain possession of the said will.

3. That on August 20, 1995, a copy of the said will was sent to your petitioner by the said Saunders & Co., the same having been compared by them with the original and found to agree therewith. The said solicitors have, inspite of repeated request from the petitioner, neglected to deliver up the original to him.

4. So far as your petitioner is aware there is not now in India, a more authentic copy of the said will than the aforesaid copy and it is necessary for the interest of the estate that probate should be granted without waiting for the arrival of the original.

Under Section 300 (1) of the Succession Act, the High Court shall have concurrent jurisdiction with the District Judge in the matter of grant of probate or letters of administration. The court proceedings relating to the grant of probate are to be regulated by the provisions of Code of Civil Procedure (*V. Prabha* v. *State*, A 1995 Delhi 128).

5. *Same as in precedent No.68.*

Your petitioner prays that probate may be granted of the copy of the said will, limited until the will or authenticated copy of it is produced.

No. 73—Application for Probate of the Contents of a Lost Will

1-2. *Same as in precedent No.70.*

3. The said will was executed in the presence of your petitioner and no draft of it was made and so far was your petitioner knows no copy of it has ever been prepared.

4. The purport of the said will, to the best of the recollection of your petitioner, was that the testator gave the whole of his agricultural property to your petitioner, his house at No.13 Cotton Street, Calcutta, to his widow, Smt. Ram Kali and the whole of his cash in deposit in the State Bank of India, Calcutta Branch, to his nephew, Ram Das.

5. *Same as in precedent No.68.*

Your petitioner prays that probate of the contents of the said will as stated above may be granted.

No. 74—Application for Revocation of probate under section 263

1. Your petitioner is the executor of the last will, dated March 14, 1994, of late Atul Chandra Bose, of Hooghly, who died on April 22, 1994.

2. One Krishna Das Bose obtained from this court probate of pretended will of the said Atul Chandra Bose dated April 14, 1993, after concealing all the processes of this court.

3. The said Atul Chandra Bose did not execute the will, the probate of which has been obtained by the said Krishna Das Bose from this court on July 20, 1995.

4. Alternatively, the said will was impliedly revoked by the later will mentioned in paragraph (1) of this petition.

Your petitioner prays that the grant of probate to Krishna Das Bose of the pretended will of Atul Chandra Bose be revoked and such orders may be passed as may be deemed necessary.

No. 75—Application for Letters of Administration under section 278

1. The late Atul Chandra Bose died intestate on February 10, 1995 at Alipore.

2. The said Atul Chandra Bose had, at the time of his death, a fixed place of abode (*or*, had a shop at Alipore) within the jurisdiction of this court.

3. The following are the members of the family and relatives of the said Atul Chandra Bose :

Names of family members and relatives			*Address*
*	*	*	*

4. Your petitioner is the son of the said Atul Chandra Bose and his legal heir.

5. The amount of assets, etc., (*as in para 5 of application No.68*).

Your petitioner prays that letters of administration to the estate of the said Atul Chandra Bose be granted to him.

No. 76—Application for Letters of Administration with Will Annexed

1-2. *Same as in precedent No.68.*

3. Ram Chandra Chatterji, the son of the deceased and sole executor named in the said will, survived the said deceased but has since died without having taken the probate of the said will.

4. Your petitioner is the grandson of the said deceased and one of the residuary legatees named in the said will.

5. Your petitioner will administer according to law all the assets which by law devolve on or vest in the personal representatives of the said deceased.

6. The said testator had, at the time of his death, a fixed place of abode (*or*, had a shop) at Hoogly within the jurisdiction of this court.

7. The following are the members of the family and representatives of the said Gopal Chandra Chatterji :

(i)

(ii)

(iii)

8. *Same as para 5 in precedent No. 68.*

Your petitioner prays that letters of administration with will annexed to the estate of the said Gopal Chandra Chatterji be granted to him.

No. 77—Application for Appointment of a Curator under section 192

1. Ganesh Prasad of Kaimganj, district Farrukhabad, died on the 20th day of July 1995, at Kaimganj within the jurisdiction of this court.

2. The said Ganesh Prasad died being possessed of movable and immovable property situate within the jurisdiction of this court.

3. The said deceased was not a member of a joint Hindu family and your petitioner is the lawfully married wife of the said deceased and is, according to Hindu Law, his only heir.

4. One Sheo Prasad falsely alleging himself to be the adopted son of the said Ganesh Prasad , deceased, has forcibly and illegally taken possession of the residential house of the deceased and all his movable property and threatens to take forcible possession of immovable property also.

5. The said Ganesh Prasad also carried on a money lending business on an extensive scale and large amounts of money are due to his estate on bonds and pronotes and your petitioner has been informed that the said Sheo Prasad is realising monies of these bonds and pronotes.

6. The said Ganesh Prasad has also an extensive business of sugar manufacture at Kaimganj and the said Sheo Prasad has also taken possession of the said business and your petitioner has been informed that he is removing various articles of the said business including the account-books.

Your petitioner will be materially prejudiced and will not get any effective relief by a regular civil suit if a curator is not appointed at once.

Your petitioner prays that a curator may be appointed to the estate of Ganesh Prasad, deceased.

PETITIONS UNDER INSOLVENCY ACT

No. 78—Petition for Insolvency, by Debtor

1. Your petitioner has become heavily indebted owing to certain business losses and is unable to pay his debts.

2. Your petitioner ordinarily resides at Varanasi within the jurisdiction of this court (*or*, the petitioner is imprisoned in the Civil Jail at Varanasi).

3. An order for attachment of the property of your petitioner in execution of decree No.104 of 1995 passed by the Court of Civil Judge (Junior Division) at Varanasi has been made by that court (*or*, your petitioner has been arrested and imprisoned in the Civil Jail by order of the Civil Judge (Junior Division) at Varanasi, in execution of decree No.104 of 1995 passed by him).

4. The amount and particulars of all pecuniary claims against your petitioner, with the names and addresses of his creditors, so far as they could be found, are specified in Schedule A, annexed to this petition.

5. The amount and particulars of all your petitioner's property together with its value and place at which it is to be found, are fully specified in Schedule B, annexed to this petition and your petitioner is willing to place all the said property at the disposal of the court.

6. Your petitioner has not, on any previous occasion, filed a petition to be adjudged an insolvent (*or*, the petitioner made a petition to be adjudged an insolvent on October 1, 1995 in the court of the District Judge at Ghazipur, but the same was dismissed as the court then held that petitioner's assets were enough for his debts).

Your petitioner prays that he may be adjudged insolvent.

No. 79—Petition for Insolvency, by a Creditor *(oo)*

1. Ramnath, son of Shamlal, resident of village Pachenda, Tahsil Khurja, District Bulandshahr, is indebted to your petitioner in the sum of Rs.4,300 due on a bond, executed by him on February 4, 1993.

(oo) It is necessary for the petitioning creditor to allege the acts of insolvency complained of by him in the petition and specify particulars as to the time and place of their commission. It is, however, not necessary for him to aver that the debtor is unable to pay his debts (*Jagannath* v. *Badri Prasad*, A 1949 EP 359). In

2. The said Ramnath ordinarily resides in the said village Pachenda within the jurisdiction of this court.

3. The shop of the said Ramnath in the village Pachenda has been sold on January 5, 1994 in execution of a money decree No.503 of 1992, passed by the Civil Judge (Junior Division) at Khurja for payment of Rs.5,354 and costs.

Your petitioner prays that the said Ramnath be adjudged insolvent.

No. 80—Application for a Protection Order under section 31 *(pp)*

1. The applicant has been adjudged insolvent by an order of this court, dated December 10, 1994.

2. One Ram Bilas, son of Ram Kumar Vaish, of Kanpur, holds decree No.154 of 1994 passed against the applicant by the court of the Civil Judge (Senior Division) at Kanpur.

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view of the doctrine of relation back, vide section 28 (7), Provincial Insolvency Act, it is enough if debt was not time barred on date of application (*Allampati Gopalareddy* v. *P.Raghava Reddy*, A 1985 AP 12).

An insolvency petition by one of Joint-creditors is maintainable (*Elbrose Textiles Ltd.* v. *Surendra Kumar Harkishore Jain*, A 1993 Bom 381, *Anuradha Kumar* v. *Sadhu Chandra*, A 1926 Cal 234 DB dissented from). The words "debts" in section 10 of the Provincial Insolvency Act should be construed as "debt", hence an insolvency petition in respect of single "debt" is maintainble (*S.Damodaran Pillai* v. *K. Nanthedu Bava*, A 1992 Ker 212). At the time of admission of the insolvency petition, hearing to the debtor is not necessary, the Court may in its discretion issue notice to the debtor or the person filing caveat under section 148A C.P.C. (*Radheshyam Agrawal* v. *Hariom Trading Co.*, A 1992 MP 168). In an insolvency petition filed by the creditor, the plea that the debtor has means to pay the debts is open to the debtor and not to the debtor's transferee (*V.Rosaiah* v. *P.Subramanyam*, A 1989 AP 204). Where in the transfers made there is no intention to defeat or delay the creditors, the act of the debtor does not constitute act of insolvency (*Maneklal Kantilal & Co.* v. *Shavarlal Harjivadas*, A 1991 Guj 143).

Where Civil Judge has been invested with insolvency jurisdiction under section 3 of the Provincial Insolvency Act, he does not become Principal Civil Court of original jurisdiction, appeal from his orders lie to the District Judge and not to the High Court (*Kewal Singh* v. *Ram Chander*, A 1990 All 99).

(pp) This application will be necessary only about debts in respect of which suits and proceedings are pending on the date of adjudication as no proceeding

3. The said Ram Bilas has applied to the court of the Civil Judge (Senior Division) at Kanpur for execution of the said decree by the arrest and detention of the applicant, and the said court has, by an order, dated March 24, 1995, refused to stay the execution proceedings and has passed an order for the issue of a warrant for the applicant's arrest.

The applicant prays that an order for his protection from arrest and detention in execution of the said decree be passed.

No. 81—Application for Discharge under section 41

1. The applicant was adjudged insolvent by an order of this court, dated April 24, 1994.

2. The applicant was directed by the said order to apply for his discharge within one year from the said order.

3. The debts of the applicant entered in the schedule have been paid off by the Receiver to the extent of two-thirds.

The applicant prays for an order of his discharge.

No. 82—Application for Annulment of Adjudication (Section 43)

1. The opposite party was adjudged insolvent by an order of this court, dated March 23, 1993.

2. By the said order, the opposite party was directed to apply for his discharge within two years.

3. The said period of two years has expired and the opposite party has not yet applied for his discharge. The applicant prays that the said order of adjudication, dated March 23, 1993, be annulled.

No. 83—Application under Section 53 for Avoidance of a Transfer

1. The opposite party No.1 was adjudged insolvent by this court by an order dated October 25, 1995, and the applicant was appointed Receiver of his property.

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can legally be taken in respect of other debts after the date of adjudication [section 28 (2)]. The insolvent can move the court in which proceedings are pending against him for an order staying the proceedings (under section 29), and if the order for stay is not made, he will have to obtain the protection.

2. The opposite party No.1 has on December 30, 1993 transferred by a deed of gift the property detailed at the foot of the application in favour of the opposite party, No.2.

(*Or*, the opposite party No.1 has made various transfers of portions of his property in favour of the opposite parties Nos.2 to 9. Full particulars of the said transfers with their dates are mentioned in Schedule A annexed hereto and which should be treated as part hereof.

3. The opposite party No.1 was adjudged insolvent on a petition presented by him within two years after the date of the said deed of gift (*or*, within two years after the dates of the said transfers) that is, on June 10, 1995.

The applicant prays that the said deed of gift (*or*, the said transfers) may be declared void as against him and may be annulled.

No. 84—Application by Receiver under section 54 (1) for Avoidance of Fraudulent Preference

1. *Same as in previous precedent.*

2. The opposite party No.1 transferred his house by a deed of sale dated May 20, 1996, in favour of opposite party No.2 in consideration of a private debt due to the latter from opposite party No.1.

3. The opposite party No.1 was indebted to a large number of persons, and, being unable to pay his debts as they became due from his money, has executed the sale deed in favour of the opposite party No.2 with a view to giving him preference over the other creditors.

4. That the opposite party No.1 has been adjudged insolvent on a petition presented by some of his creditors within three months after the date of the transfer specified in para 2, that is on June 10, 1995.

The applicant prays that the said transfer may be declared void as against the applicant and may be annulled.

No. 85—Application of a Third Person for Release of His Property Attached by Receiver (Section 86)

1. The applicant is the owner of the house described at the foot of this application.

2. The official receiver has, on August 21,1995, wrongfully

attached the said house as the property of one Khuda Baksh insolvent.

The applicant prays that the said attachment of the said receiver be reversed and the said receiver be ordered to release the said property.

No. 86—Application under section 83, Transfer of Property Act *(qq)*

1. On January 4, 1990, one Ram Rattan made mortgage in favour of Janki Prasad deceased, now represented by the opposite party.

2. Under the terms of the said mortgage-deed, the mortgage is redeemable in the month of *Jeth* any year.

3. The said Ram Rattan has sold a portion of the mortgaged property to the applicant by a sale-deed, dated May 4, 1994.

4. Rs.26,350 is due to the opposite party on the said mortgage.

5. The applicant deposits the said sum in court, and prays that a notice of the said deposit be issued to the opposite party.

No. 87—Reply to the Above

1. The opposite party is willing to accept the money deposited by the applicant in full discharge of the mortgage money due to him.

2. The opposite party deposits the mortgage-deed in the court.

(qq) The applications cannot be dismissed. If the tender is not accepted, the application will be simply shelved or deposited. If it has been shelved for non-appearance of the mortgagee, and the mortgagee appears at any time afterwards, the money cannot be paid out to him, except with the consent of the applicant. With the consent of both the parties, the case can be revived and money paid out to the mortgagee. It is not necessary that, on the date fixed for the return of notice to the the mortgagee, the mortgagor should be present. Even if he is absent and the mortgagee accepts the tender, an order will be passed that the money be paid out to him.

If the mortgagee is a minor, the applicant should make an application for appointment of a guardian *ad litem* for him, but if a curator of the property or guardian of the minor's property has already been appointed under the law (e.g., under the Guardians and Wards Act), the tender can be made to him, and no proceedings for appointment of a guardian need be taken. If proceedings for appointment of guardian are not properly taken the tender will not save the running of interest (*Phoolkuer* v. *Rewari*, 1930 ALJ 1020). If the applicant himself is a minor, he must apply through a guardian and should make an application for the formal appointment of the guardian for the purpose of the proceeding (section 103,

APPLICATIONS UNDER THE ARBITRATION AND CONCILIATION ACT, 1996 *(rr)*

No. 88—Application for Appointment of an Arbitrator (section 11 of Act of 1996)

1. By an agreement executed by the parties on the 23rd January, 1997 the applicant agreed to sell to the opposite party from time to time such quantity of silver as the opposite party wanted to purchase on the terms and conditions embodied in the said agreement.

2. Clause 15 of the said agreement provided that if any difference arose between the parties regarding any transaction of sale of silver made under the said agreement, it should be decided by arbitrator.

3. Several differences have arisen regarding several transactions of sale made by the applicant under the aforesaid agreement.

Transfer of Property Act), unless the guardian has been appointed by court. If the mortgagee is dead, the tender should be made in favour of all the heirs and if it is made in favour of some only, interest will not cease to run (*Ram Gopal* v. *Lachmandas*, A 1938 All 423, 1938 ALJ 617). If the money deposited falls short of the total dues under the mortgage even by a small amount, the mortgagee is not liable to accept the amount tendered and the interest on the mortgage money continues running (*Debi Prasad* v. *Kedar Singh*, A 1921 All 280 DB; *Sagar Mal* v. *Jwala Sahai*, 1946 ILR 97; *Pushparani* v. *Ram Chandra Panda*, A 1977 Orissa 23). The reply of the mortgagee must clearly state that he accepts the money in full discharge of the mortgage and the money will not become his until such consent has been signified (*Kunjunni* v. *Sankarnarain*, 28 TLJ 633). It is not open to the court to decide or pass any order on any points of dispute in case the mortgagee does not file a verified petition accepting the money deposited but files objections. In such a case the court should simply order that the application be filed (*Suryanarayana Rao* v. *Srinivas Rao*, (1949) 54 Mys HCR 136). Section 83 will not be applicable once a suit is filed (*Raj Krishna Menon* v. *Sundaram Pillai*, 1963 Ker LJ 1031).

(rr) The Arbitration has traditionally been considered as an efficacious alternative to litigation. However, the Arbitration Act, 1940 containing the substantive law of arbitration had become increasingly outmoded and discredited. Therefore, the new Arbitration and Conciliation Act, 1996 has replaced the Act of 1940 and is in force since 25.1.96. The new Act has eliminated the core weakness in the earlier Act i.e. the numerous provisions which provided for court intervention at almost every stage of conduct of arbitral proceedings. The new law provides for only two occasions when court intervention can be sought at the pre-arbitral and award stage.

4. The applicant desired that the opposite party should concur in the appointment of an arbitrator for settlement of the aforesaid differences but the opposite party always puts him off and never agreed to the appointment of an arbitrator.

5. On the 18th June 1997, the applicant sent a notice by registered post calling upon the opposite party to concur in the appointment of an arbitrator for settlement of the aforesaid difference under clause 15 of the said agreement and the said notice was served on the opposite party on the 25th June 1997, and thus 30 clear days have passed and the opposite party has not sent to the applicant any reply nor has he appointed or concurred in the appointment of an arbitrator.

Maximum freedom has been given to the parties in the matter of composition and appointment of the arbitral tribunal. The parties may either agree on the number and procedure for appointment, all by themselves or agree to abide by an existing procedure for appointment. Section 11 empowers the Chief Justice of a High Court or the Chief Justice of India, as the case may be, to appoint the arbitrator. The Chief Justice is also empowered to designate any person or institution to take the necessary steps for the appointment of arbitrator.

Section 12 (3) of the Act gives power to the parties to challenge the appointment of an arbitrator, before the Arbitral Tribunal, on specific grounds. This is an important departure from the provisions of the 1940 Act which required the parties to approach the court for removal of an appointed arbitrator. The new law also confers competence on the arbitral tribunal to rule on its own jurisdiction and to consider objections with respect to the existence or validity of the arbitration agreement.

Section 19 of the Act provides that the arbitral tribunal will not be bound by the Code of Civil Procedure, 1908 or the Indian Evidence Act, 1872. However, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting its proceedings. They may also agree that the arbitral tribunal may follow the procedure under the rules of arbitration of established arbitral bodies. This is an instance of the new law promoting institutional arbitration.

Section 31 of the Act requires the arbitral award to contain reasons unless the parties have agreed that no reasons are to be given. This is also a significant departure from the provisions of the Arbitration Act, 1940, which contained no such mandatory provision requiring the arbitrator to record reasons. Doubts have been expressed as to the wisdom of making it mandatory under the law to give reasons for the award. It has been contended that giving of reasons in the award will make it vulnerable to judicial scrutiny and thereby affect the finality of the award. It may, however, be pointed out that by virtue of the provisions in sections 5 and 34 of the Act, the scope of judicial scrutiny of the award is quite restricted.

The applicant, therefore, prays that the court will be pleased to appoint an arbitrator for settlement of the aforesaid differences between the parties.

No. 89—Application of Substitution of an Arbitrator

1. By a deed of agreement of reference dated 5th October, 1996, the parties appointed A, B and C arbitrators for making a partition of joint family property of the parties.

2. The arbitrators entered on the arbitration on the 25th October, 1996, but before they could complete the arbitration, arbitrator A died on the 2nd November, 1996, (*or*, arbitrator A, by a notice sent by him to the applicant on the 2nd November, 1996, intimated his unwillingness to act as an arbitrator), (*or*, arbitrator A has on the 2nd November, 1996 been convicted of a criminal offence and sentenced to seven years rigorous imprisonment and has thus become incapable of acting as an arbitrator), (*or*, arbitrator A ceased to attend arbitration proceedings and to proceed with the reference, though requested by the applicant and by the other arbitrators several time to do so, the last of such request was made by the applicant by means of a registered notice served by post on the.....).

It is a settled principle that no court can sit in appeal over an award given by an arbitrator. The provisions of section 34(2) clearly define the grounds on which an application for setting aside an award can be entertained by a court. **These grounds are confined to lack of capacity of a party, invalidity of the arbitration agreement under law, violation of principles of natural justice and the arbitrator exceeding his terms of reference.** The scope of judicial scrutiny, therefore, even when the award is a speaking order is limited. It will be reasonable to assume that the court will not interfere with an arbitral award merely on the ground of a wrong interpretation of the law by the arbitrator or an inadequate appreciation of facts or evidence by him. Section 36 of the Act confers on the award the status of a decree. This provision, again, is a departure from the provision of the Act of 1940, which provided the filing of the award in court and obtaining a judgment in terms of award.

Though the new law repeals the Arbitration Act, 1940, from the date of commencement of the Act, the provisions of the repealed enactments will continue to apply in relation to arbitral proceedings which commenced before the Act came into force (unless the parties have agreed otherwise). In other words, all arbitral proceedings pending on 24-1-1996, will continue to be governed by the repealed enactment by virtue of the saving provided by section 85.

Section 85 also saves the validity of all rules and notifications issued prior to 24-1-1996 under the repealed enactment to the extent they are not repugnant to

3. On the ....., the applicant sent by registered post a notice calling upon the opposite party to concur in the appointment of another arbitrator in place of the said A, and the said notice was served on him on the ..... but though more than 30 clear days have passed the opposite party has not done so.

The applicant, therefore, prays that the court will be pleased to appoint another arbitrator in place of A.

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the new law. Such rules or notifications would be deemed to have been made or issued under the new law. In view of this provision, all rules, notifications etc., made under the earlier enactments will still be valid so long as they are not inconsistent with the provisions of the new Act. However, it would appear that the rules made by the various High Courts under section 44 of the Arbitration Act, 1940 may require a fresh look since some of the provisions and the forms in the earlier rules, such as those relating to statement of special case to the courts, filing of award, etc. may no longer be required under the new law.

Under the Act, the High Courts have been given power to make rules with relation to proceeding before the court (section 82). The Central Government has also been given power to make rules for carrying out the provisions of the Act (section 84). The power given to the Central Government under section 84 is a residuary power to enable it to fill the gaps in the law, if any, by subordinate legislation.

Part III of the Act has also, for the first time in India, provided a detailed statutory frame work for the conduct of independent conciliation proceedings outside Court. It is for the parties to agree to refer a dispute to conciliation. The conciliator has to be a person who is not only impartial and independent, fair and objective, knowledgeable and tactful, but also to be a man who can influence the parties by his personality and persuasive skills. A noteworthy principle incorporated into law by the Act is that a settlement agreement reached by the parties and signed by them with the help of the conciliator will be final and binding on the parties and the persons claiming under them. Such a settlement agreement will have the same status and effect as if it is an arbitral award on agreed terms [Section 30 (3)].

The Arbitration and Conciliation Act is a new and bold initiative. It is based on the assumption that many disputes can be resolved without resort to litigation in court. It also assumes that there are fora other than courts where disputes can be resolved.

The provisions of the old Arbitration Act, 1940 may continue to apply to the arbitration proceedings pending on the commencement of the Act of 1996, hence apart from giving certain model applications under the new Act of 1996, the model petition relevant under the repealed Act of 1940 have also been retained and the relevant case law also discussed.

No. 90—Application for Appointment of Third Arbitrator

1. By a deed of agreement dated 8th February, 1996 the parties referred certain disputes between them to the arbitration of A and B.

2. By clause 7 of the said deed it was provided that the arbitrators should appoint a Third Arbitrator.

3. By a notice sent by registered post and served on the said arbitrators on the 28th June, 1996 the applicant called on them to appoint the Third Arbitrator but they have not yet done so.

The applicant, therefore, prays that the court will be pleased to appoint the third arbitrator.

No. 91—Application for Removal of Arbitrator

1. By a deed of agreement dated 15th February, 1996, the parties referred certain disputes between them to the arbitration of A.

2. The said arbitrator did not enter on the reference for a long time, though requested several times to do so and the applicant served a notice on him by registered post on the 8th August, 1996 calling upon him to enter on and proceed with the reference but though more than five months have expired he has neglected to do so.

(*Or*, the said arbitrator entered on the reference on the 15th March, 1996 and examined the parties but has done nothing further although he

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Law prior to encatment of Arbitration and Conciliation Act, 1996

The Arbitration Act 1940 is self-contained and no proceeding otherwise than under the Act can be taken for a decision upon the existence, effect or validity of an arbitration agreement or award (section 32). A suit to enforce an award in which the defendant denies the existence or validity of an award, is barred by section 32, Arbitration Act (*Ram Chandra Singh* v. *Munshi Mian*, A 1950 Pat 48; *Shri Ram* v. *Shripat Singh*, A 1957 All 106). Conversely, if award is not filed in court, suit on original cause of action is not barred by section 32 (*Ram Sahai* v. *Babu Lal*, A 1965 All 217). The person who is already working as an Arbitrator for one of the parties, can be directed to act in place of person who has refused to work (*Kasturba Health Socy.* v. *National Building Construction Corpn. Ltd.*, A 1995 Bom 267).

In the absence of contrary agreement, an arbitrator is bound to finish the arbitration within 4 months (Sch.1, Cl. 3) and if he does not, it is neglect. Particulars of neglect should be specified in the application. If the award is delivered beyond 4 months it is invalid and can be avoided (*Abdul Hakim Khan* v.

fixed several dates for hearing and the parties were ready with their evidence and account books, always postponing the case for one reason or another, which were all equally inadequate. The said arbitrator has thus failed to use reasonable dispatch in proceeding with the reference.)

For the above reasons the applicant prays that the said arbitrator be removed.

No. 92—Application for filing an award [Section 14 (2) of Arbitration Act, 1940]

1. On the 14th day of January 1994, the applicant and the opposite party having a difference between them, concerning the partition of their family property, agreed in writing to submit the said difference to the arbitration of Sri Radha Charan, Advocate.

2. The said Sri Radha Charan entered upon the arbitration and made an award in writing on 20th April 1995.

3. The said arbitrator was requested by the applicant to file in court the award or a signed copy of it with depositions taken by him and

Dominion, Lahore Improvement Trust, A 1950 Lah 132). Now under the Act of 1996 no such period for making the award has been prescribed.

An applicant who raises no objection in respect of a biased arbitrator knowing him to be partial all the time and takes the chance of the award turning out to be favourable to him in spite of such partiality cannot be permitted to put forward such grounds if ultimately the award turns out against him (*National Fire & General Isurance Co.* v. *Union of India*, A 1956 Cal 11; *Dhar Pvt. Ltd.* v. *Union of India*, 68 CWN 927).

Under section 14 of the Arbitration Act the parties have been given a right to require the arbitrator to file the award in court. The arbitrator is bound to file the award if directed by the court. Application for direction of the court will presumbly be necessary only if the arbitrator fails to file the award at the request of the parties. The "court" is the court having jurisdiction in the subject-matter of the suit; but no application can be made in a Small Cause Court (section 23). The court may, if the award has been filed, modify or correct it under section 15 or remit it for reconsideration under section 16 or set it aside on a ground mentioned in section 30 and in all such cases the order will be appealable (section 39). An application for setting aside or remitting an award can be made by any party including the one on whose application the award was filed. If the court does not pass any such order, it shall pronounce judgement in terms of the award (sec. 17), and a decree shall follow which will not be appealable. Decree can be passed on an award which is partly valid, if the part invalid is separable (*Md. Mustafa* v. *Md. Yar*, A 1940 Lahore

documents proved before him but he has not complied with the request.

4. The applicant prays that the said arbitrator be directed to file in court the award with full record of depositions and all the documents proved before him by the parties, and upon his filing the same, further proceedings be taken according to law.

No. 93—Application to Modify an Award under section 15 of Arbitration Act, 1940

1. The parties referred their dispute to the arbitration of A, who made his award and filed it in this courtand the court has issued a notice of filing the said award to the applicant.

2. The applicant submits that the award is defective in the following respects.

(a) The question of any maintenance allowance being paid by the applicant to his step-mother B was not referred to the arbitrator and therefore, the portion of the award directing applicant to pay Rs.1,000 per month, as maintenance to B is invalid.

(b) It is stated in the award that the applicant is entitled to get a sum of Rs.10,000 from the opposite party but the award is imperfect in so far as it does not specifically direct that the opposite party should pay that sum to the applicant.

(c) It is stated in para 4 of the award that the applicant's share in the grove is 1/4th and in house 1/3rd but in the last paragraph the arbitrator has awarded to the applicant a 1/3rd share in the grove and 1/4th share in the house which is an error arising from an accidental slip.

(d) The applicant's half share in a shop has been recognised by the arbitrator in para 9 of the award but by an accidental omission this has not been mentioned in the last para, where the final award has been made.

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24). This is now the only remedy of a party to an award wishing to enforce it, as a suit for a decree on the basis of an award is barred by section 32.

Where in such a proceedings, the other party filed a written statement challenging the reference and award, it was held that the written statement should be treated as an application under section 33 and therefore the other party could appeal under section 39, even though a decree was passed in terms of the award (*Gauri Singh* v. *Ram Lochan*, A 1948 Pat 430.

A guardian mother of a minor is entitled to enter into an agreement to refer to

The applicant, therefore, prays that the aforesaid defects in the award be removed by suitably modifying or correcting the same.

No. 94—Application for Remitting an Award (section 16 of Arbitration Act, 1940)

1. *Same as in the previous precedent.*

2. In para 3 of the agreement of reference dated.....the parties had also referred to arbitration, the question of the applicant's right of way to the well through the grounds of house No.4, but the award has left this matter undetermined.

3. There was no dispute about house No.5 which was in possession of the applicant and the question of partition of houses Nos.1,2,3 and 4 only was referred to arbitration but the arbitrator has partitioned all the five houses by putting them in one hotch-potch, and the award about houses Nos.1 to 4 is not separable from that about house No.5.

4. The award is indefinite in so far as it directs that the opposite party should give possession of house No.1 to the applicant whenever he can conveniently shift to another house.

5. The award is illegal on the face of it in so far as it had awarded to the opposite party against the applicant, a sum of Rs.500 on account of a contract which on the arbitrator's own finding was illegal and therefore void.

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arbitration on behalf of the minor (*Raghupati* v. *Ram Gopal*, A 1939 Cal 557), and so a manager of a joint Hindu family on behalf of other members (*Kanshi Ram* v. *Harman Das*, A 1940 Lah 73). An agreement to which minor is a party is not void.

Where arbitration is made during the pendency of a suit, the reference should be made through court, otherwise, the award cannot be enforced (*Ramdayal* v. *Sheodayal*, 183 IC 128, A 1939 Nag 186; *I.G.H. Ariff* v. *Bengal Silk Mills*, A 1949 Cal 350; *Maung Hlay* v. *U.Ge*, 183 IC 343, A 1939 Rang 300). An Appellate Court can make the reference (*Nachiappa* v. *Subramaniam*, A 1960 SC 307), but an execution court cannot (*Mordhwaj* v. *Bhudar Das*, A 1955 All 353 FB). However, if during pendency of execution proceedings an arbitration takes place and award is given, it can be given effect to under the proviso to section 47 Arbitration Act, if all parties agree to it after the award (*Mordhwaj*, supra). Insolvency court is not a Civil Court, therefore, no arbitration can be made in insolvency proceedings (*Mangilal* v. *Deo Chand*, A 1949 Nag 110).

The applicant prays that the said award be remitted to the arbitrator for reconsideration within such time as the court may fix.

No. 95—Application for Reference to Arbitration

1. The applicants are the parties interested in this suit.

2. The applicants agree that the following matters in difference between them be referred to the arbitration of Budh Singh, Niha Chand and Ram Prasad, resident of village Qudauli, Tehsil Hapur, District Ghaziabad.

(a) Whether the defendant executed the pronote in suit ?

(b) Whether the bond in suit was executed as security against losses on *badhni* transactions and not for a cash loan ?

(c) Whether the defendant purchased any grain for the plaintiff in 1991 ?

(d) How much, if anything, is now due to the plaintiff from the defendant ?

3. The applicants further agreed that in case of difference of opinion, the decision of the majority of the arbitrators shall prevail, that all sittings of the arbitrators shall take place at Hapur, and that the parties shall not be entitled as of right to produce any evidence before the arbitrators, but that the arbitrators may take any evidence they think necessary.

The applicant, therefore, pray for an order of reference accordingly.

No. 96—Application for correction/interpretation of Award

The petitioner submits as under :

1. In pursuance of the arbitration clause contained in the agreement entered into between the parties, the matter was referred to the Arbitral Tribunal which has made the award on 1st May, 1996.

The application should be made by all the parties *interested in the subject matter of reference* though not necessarily by *all* the parties to the suit (*Hoassamal* v. *Kodanmal*, 104 IC 342; *Abdul Kadir* v. *Madhav Prabhakar*, A 1962 SC 406). If a party does not give his consent, reference and award are vitiated (*Sammiti* v. *Yallialwar*, 102 IC 2; *Tej Singh* v. *Ghosi Ram*, 102 IC 236; *Ahmad* v. *Sardara*, 114 IC 712, A 1929 Lah 171); but if the non-joining party is represented before the arbitrator, the proceeding will not be vitiated (*Jaisil* v. *Tel Ram*, 122 IC 100, A 1930 Lah 523).

2. In the said arbitral award, a clerical error has crept in. A perusal of para 2 of the award shows that the Tribunal has awarded interest amounting to Rs.12,000/- to the petitioner against the opposite party, but in the operative part a sum of Rs.1,200/- is awarded as interest. The said mistake is a mere clerical error.

It is, therefore, prayed that the aforesaid error in the award be corrected and the figure of Rs.1,200/- be rectified as Rs.12,000/-

No. 97—Application for Additional Award (section 33 (4) of Act of 1996)

The petitioner submits as under :

1. In pursuance of the arbitration clause contained in the agreement entered into between the parties, the matter was referred to the Arbitral Tribunal which has made the award on 1st May, 1996.

A *pro forma* defendant cannot be said to be a party interested (*Raminder* v. *Mohinder*, A 1940 Lah 186, 190 IC 399), but an absent defendant against whom the plaintiff wants a decree is a person interested (*Girja* v. *Kanai*, 43 IC 169, 27 CLJ 339; *Parasuram* v. *Muthu Swamy*, A 1925 Mad 1209, *Sabta* v. *Dharmakirti*, 35 A 107; contra *Ajudhia* v. *Badrul Hasan*, 15 ALJ 427, 29A 489, 41 IC 357). In a case, A sued B and C for partnership accounts alleging that C had retired and was not liable. C was absent, but B pleaded that C was liable. It was held that C was not a party interested (*Mahadev* v. *Narayan*, 30 BLR 530, 110 IC 343, A 1928 Bom 248 DB). An important test is to consider whether a person is a necessary party or such that if not orginally impleaded, the court would direct him to be joined under O.1, R.10 (*Sharafat Ali* v. *Mst. Bhagvati*, A 1929 All 763, 1930 ALJ 239 DB). Either the parties themselves or their agents specially authorised to make such application should join. A partner in a firm cannot refer a case to arbitration on behalf of the firm though he can prosecute or defend the suit (*Gopal Das* v. *Baij Nath*, 24 ALJ 235, A 1926 All 238 DB). If some of the parties are interested in a part of the subject-matter, they can refer to arbitration their dispute about this part, and the rest of the suit will continue (section 24). The application should mention the matter sought to be referred, and the items and conditions of reference which may be agreed upon. The application should be made by all parties but need not be signed by them (*Umed Singh* v. *Sobhagmal*, 43 C 290; *Gudipoodi* v. *Kattapalli*, 105 IC 1051; *Sharafat Ali* v. *Mst. Bhagwati*, A 1929 All 763, 1930 ALJ 239 DB). The guardian of a minor party requires permission of the court (*Seth Ramgopal* v. *Lala Shantilal*, A 1942 All 85; *Kedar Nath* v. *Basant Lal*, 183 IC 422, A 1939 Pat 278; *Shripada* v. *Datta Traya*, 183 IC 753, 41 BLR 485, A 1939 Bom 296; *Umargul* v. *Abdulmanan*, A 1940 Pesh 12, 187 IC 860; *Ramanatham* v. *Kumarappa*, A 1940 Mad 650, 1940 MWN 191). If more powers are desired to be given to arbitrators than those given in the order of reference, the parties should apply to the court for a fresh order of

2. In the claim put forward by the petitioner, the petitioner also claimed Rs.5,000/- damages or any such other amount as may be determined by the Arbitral Tribunal on account of the failure of the opposite party to execute the sale deed in favour of the petitioner. But the Tribunal has not given any finding on the petitioner's claim and has not awarded any damages under the said claim.

It is, therefore, requested that the Arbitral Tribunal may make an additional award as to the claim of the petitioner for damages aforesaid.

No. 98—Application to Set aside an Award

1. In a case referred by the parties to arbitration, the arbitrator has filed an award in this court, notice of which has been issued by the court to the applicant.

2. The applicant prays that the said award be set aside on all or any of the following grounds and the said arbitration be superseded, viz.

(1)

(2)

(3) etc.

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reference and cannot themselves by agreement give such power to the arbitrator (*Sherbanubhai* v. *Hosseinbhai*, A 1948 Bom 292, 50 BLR 89). If there is no valid reference the award will be a nullity and can be challenged in any appropriate proceeding apart from section 30 (*Chhabha Lal* v. *Kullulal*, A 1946 PC 72; *Shukrulla* v. *Rahmat Bibi*, A 1947 All 304). Until the award has been filed, an application for setting it aside cannot be made (*Ratanji* v. *Dhirajlal*, A 1942 Bom 101; *Bengal Jute Mills* v. *Jevraj*, A 1944 Cal 304), but if award is filed soon after the application, the latter can be considered (*I.G.H. Ariff* v. *Bengal Silk Mills*, A 1949 Cal 350). If a party is dissatisfied with an award he may wait till the award is filed and he receives notice.

Limitation : An application under section 20 of the Arbitration Act is governed by Art. 137 of the Limitation Act, 1963, and has to be filed within 3 years (*Union of India* v. *Momim Construction*, A 1995 SC 1927). In arbitration proceedings under the same arbitration agreement, successive references of various disputes arising from time to time are not barred (*International Airports Authority of India* v. *Mohinder Singh*, A 1996 Bom 167). Limitation for filing objection against the award is 30 days from the date of award [Article 119 (a)]. On setting aside the award, court may supersede the reference (section 19). Application should be made within 30 days of the service of notice of the filing of award [Article 119 (b) Limitation Act]. The notice may be formal, informal or constructive, but must emanate from the court and not from the other party (*State of West Bengal* v. *A. Mondal*, A 1985 Cal 12).

PETITIONS UNDER
THE INDIAN DIVORCE ACT OF 1869 *(ss)*

No. 99—Petition, by Husband, for Dissolution of Marriage

(*In the Court of the District Judge at Agra*)

Between Samuel Robinson, by profession a sculptor, residing at Etmadpur, District Agra... ... ... *Petitioner.*

Catherine Robinson, residing at Drummond Road, Agra ... ... *Respondent.*

and

Henry Jackson, by profession a photo artist, residing in Partapura, in the town of Arga ... ... *Co-respondent.*

To the District Judge at Agra

The 14 the day of October, 1995.

The Petitioner, the said Samuel Robinson, showeth :

1. That your petitioner was, on February 5, 1991, lawfully married to the respondent, Catherine Robinson, then Catherine Bray, spinster, at Calcutta.

2. That, after his said marriage, your petitioner lived and cohabited with his said wife at Calcutta from 1991 to 1993 and then at Etmadpur within the jurisdiction of this court, from 1994 up to the month of June 1995, and that, your petitioner and his wife have had two issues of the said marriage, one son, Henry Robinson, aged four years and one daughter, Sarah Robinson, aged two years.

(ss) This Act applies only to Christians. Though proceedings under this Act are spoken of as suits and are conducted very much like original suits, they are commenced not by plaint but by petition, and the parties are not spoken of as plaintiffs and defendants but as petitioners and respondents.

If the petitioner is an idiot or a lunatic, the petition should be brought by the committee or other person entitled to his or her custody (section 48). If the petitioner is a minor, he or she shall sue through a next friend approved by the court, but it is essential in this case, that the next friend should file an undertaking in writing to be answerable for costs (section 49). A form of this undertaking is given at No. 14 of the Forms in the Act. The following are the reliefs which can be claimed by such petitions :

3. That during the two years immediately preceding June 21, 1995, the co-respondent Henry Jackson was constantly, except for a few short interruptions, residing in the house of your petitioner at aforesaid Etamdpur, and that, on diverse occasions during the said period, the dates of which are unknown to your petitioner, the said Catherine Robinson committed adultery with the said Henry Jackson in your petitioner's said house.

4. That, at the time of the said marriage your petitioner and his said wife were, and still are, Christians.

5. That your petitioner and the said Catherine Robinson are domiciled in India.

6. That no collusion exists between your petitioner and his said wife for the purpose of obtaining a dissolution of their said marriage or for any other purpose. Nor has your petitioner connived at nor condoned the respondent's conduct.

Your petitioner, therefore, prays that this court will decree a dissolution of the said marriage, and that the said Henry Jackson do pay Rs.15,000 as damages in respect of the said adultery, such damages to be paid to your petitioner or otherwise paid or applied, as this court deems fit.

Verification

No. 100—Petition, by Wife, for Dissolution of Marriage

1. That on April 14, 1980, your petitioner was lawfully married to Samuel Robinson at Tehran in Iran.

2. That, after the said marriage, your petitioner lived and cohabited with her said husband at Tehran up to 1988, at Bombay from 1988 to the end of 1989 and since 1990 at 90, Chowringhee Road, Calcutta and that your petitioner and her said husband have had issues of their said marriage,

(1) Dissolution of marriage.

(2) Nullity of marriage.

(3) Judicial separation.

(4) Order of protection of wife's property against her husband or his creditors.

(5) Restitution of conjugal rights.

(6) Damages for adultery.

During the pendency of such proceedings, interlocutory orders for alimony,

four children of whom two only survive, viz. Sarah Robinson, a daughter aged 15 years, and Henry Robinson a son aged 13 years.

3. That, at the time of their said marriage, your petitioner was, and is still a Christian.

4. That the said Samuel Robinson has on July 2, 1995 renounced the Christian faith and embraced Islam under the guidance of Maulana Abdul Jalil of Dacca, and on the same day, July 2,1995, at Dacca, the said Samuel Robinson went through a form of marriage according to Mohammedan rites with one Musammat Bashiran, daughter of the said Maulana Abdul Jalil.

(*Or*, that on or about July 3, 1995, the said Samuel Robinson, at his house at 90, Chowringhee Road, Calcutta committed incestuous adultery with his own daughter, the said Sarah Robinson).

(*Or*, that on July 3, 1995, at Patna, while the marriage of your petitioner with the said Samuel Robinson was still in force, a ceremony of marriage was duly performed between the said Samuel Robinson and one Laura King, whereby the said Samuel Robinson committed bigamy, and

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settlement of profits or custody of children may also be obtained on petition made for the purpose. The petitions should be drafted with the same care as a plaint. The facts on which they are founded should be alleged with the same precision and definiteness as in a plaint, avoiding all matters of evidence, law and unnecessary details. But no vague allegations or charges can be permitted and full particulars of all charges of misconduct should be given. The statements contained in every petition should be verified in the same way as allegations in a plaint (section 47). The same rules apply to written statements of the respondents, excepts that they are not required to be verified. The petition should allege :

(1) The marriage, with its necessary particulars of date and place.

(2) Whether there has or has not been any issue of the marriage, and the issue, if any, living at the time of the petition.

(3) That the petitioner or the respondent professess the Chirstian religion (section 2).

It is not necessary that he should have been a Christian at the time of marriage or his wife should be a Christian at all (*Dalal* v. *Dalal*, 32 BLR 1046). Even a Hindu marriage can be dissolved on the application of the husband after his conversion to Christianity (*Gobardhan* v. *Jasodamoni*, 18 C 252).

(4) That the husband and wife actually reside within the jurisdiction of the court or that they last resided together within the jurisdiction of the court [section 3 (3)].

that from and after the said date, the said Samuel Robinson and the said Laura King, cohabited adultery together at house No.40 Railway Road, Patna).

(*Or*, that on July 2, 1995, at his house 90, Chowringhee Road, Calcutta, the said Samuel Robinson committed rape upon the person of one Smt. Nasiban, widow of Karim Baksh of 36, Colootola Lane, Calcutta, then in employment of the said Samuel Robinson and your petitioner).

(*Or*, that on diverse occasions between January 1 and June 4, 1995, the said Samuel Robinson at his house No.90, Chowringhee Road, Calcutta, committed sodomy with Baqar Ali, son of Amir Ali of 25, Masjid Vari Lane, Calcutta, a boy servant then in the employment of the said Samuel Robinson and your petitioner).

(*Or*, that on diverse occasions from January 1, 1995 to June 1995, the said Samuel Robinson committed adultery with Smt. Nasiban, widow of Karim Baksh of 36, Colootola Lane, Calcutta, who was then in the service of the said Samuel Robinson and your petitioner; and on the Good Friday, 1995, at the house of Henry Jackson, a photographer, at Patna, where the said Samuel Robinson, and your petitioner were then temporarily staying as guests, the said Samuel Robinson struck your petitioner in the face with his clenched fist and knocked her down and dragged her from the drawing room to the verandah);

If they reside within the jurisdiction of the court it is not necessary that they should do so together. This condition is necessary only when jurisdiction is sought to be given to the court, not on the ground of present residence of the husband and wife, but on the ground that they *last resided* within the jurisdiction of the court. The word "together" governs only the words "last resident" (*Henrieta* v. *Frank Gale*, 10 IC 487, 171 PLR 1911: *Robert Leadon* v. *Ethel*, A 1926 Oudh 319, 13 OLJ 236, 94 IC 952; *Edith Walsh* v. *Edward Walsh*, 101 IC 388, 29 BLR 308; *Eates* v. *Eates*, A 1949 All 421, 1947 ALJ 670)."Reside does not mean having sexual intercourse (*Edith Walsh* v. *Edward Walsh*, 101 IC 388, 29 BLR 308). Where a suit for dissolution of marriage and damages is filed in the court of a District Judge within whose jurisdiction the petitioner and his wife were not proved to have last resided, that court has no jurisdiction to try the case and hence where a decree for dissolution is passed by that judge it would be a nullity and cannot be confirmed (*Barret* v. *Barret*, 1949 ALJ 494 FB).

These are the general requirements of all petitions under the Divorce Act. In a petition for any relief except dissolution of marriage, it should further be alleged

[*Or, (allegation of adultery)*; and, on that July 4, 1993, the said Samuel Robinson deserted your petitioner against her wish, without reasonable excuse, and from that time down to the present, being for the space of two years and upwards, has continued to desert your petitioner].

[N.B - In the last case of desertion, the following shall be substituted for the words "since 1990" in para 2: "from 1990 to July 4, 1993"]

5. That the said Samuel Robinson came to India in the year 1988, and settled there with the intention of making it his permanent home, and is now residing at Calcutta.

6. That your petitioner and the said Samuel Robinson last resided together at 90, Chowringhee Road, Calcutta within the jurisdiction of this court.

7. That no collusion exists between your petitioner and her said husband for the purpose of obtaining dissolution of their marriage or for any other purpose, nor has your petitioner connived at nor condoned his conduct.

Your petitioner, therefore, prays that this court will decree a dissolution of the said marriage of your petitioner with the said Samuel Robinson.

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that the petitioner resides in India (section 2). In the majority of cases the allegation will be implied in allegation No.4 mentioned above and need not be separately made but when the parties had last resided within the jurisdiction of the court and have since left it, it is necessary to allege that the petitioner still resides in India. Residence in India must be *bona fide* and not casual or as a traveller (*Nusserwanjee Wadi* v. *Eleanora Wadia*, 38 B 125, 20 IC 482, 15 BLR 593).

(1) Petition for Dissolution of Marriage

Domicile : As no decree for dissolution of marriage can be passed except when the parties to the marriage are domiciled in India at the time when the petition is presented (section 2), it is necessary to allege this fact in the petition. The marriage may have been solemnized anywhere and the wrong, which is the basis of the claim, may have been committed anywhere else. In the case of a foreigner, a clear intention to reside and establish himself in India without returning to his native country is necessary to be established before he can be said to have an Indian domicile. The intention is to be inferred from all the circumstances of his life, conduct, habits and so forth (*William H. Murphy* v. *H. Murphy*, 10 L 107, 115 IC 849), and a mere statement of the applicant that he intends to reside in India is not sufficient to prove domicile (*Moody* v. *Moody*, A 1938 Lah 293, 174 IC 992).

No. 101—Petition by Wife, for a Decree of Nullity of Marriage

The petition of Catherine Bray, falsely called Catherine Robinson, showeth—

1. That, on October 18, 1992, your petitioner, then a spinster, 19 years of age, was married in fact, though not in law, to Samuel Robinson, respondent, then a bachelor of 28 years of age, at Calcutta.

2. That from the said October 18, 1992, your petitioner lived with the said Samuel Robinson at diverse places and particularly at Calcutta.

The next thing to be alleged is the ground on which dissolution is claimed. (See section 10 Divorce Act; *compare* section 31 and 32, Parsi Marriage and Divorce Act; section 3, Dissolution of Muslim Marriages Act; section 13, Hindu Marriage Act). If the petitioner is the husband, adultery of the wife alone is a sufficient ground and should be alleged, with full particulars as to time, place, etc. It is not necessary to give exact dates if the same are not remembered, but the time should be clearly defined either by reference to some other well-known event, or otherwise. The petitioner can rely on adultery committed even outside India (*G.A. Clifford* v. *E. Clifford*, 45 CWN 249). The husband cannot claim dissolution of marriage on the ground of desertion (*Aluvin Singh* v. *Chandrawati*, A 1974 All 278).

If the petitioner is the wife, she must allege one or more of the seven grounds laid down in section 10, para 2, with full particulars. For instance in case of an allegation of adultery, the name of the person with whom adultery is alleged must be given; but if it is not known, it is sufficient to say so and if the person is afterwards identified in evidence, it would be sufficient (*Grant* v. *Grant*, 167 IC 743, A 1937 Pat 82). A decree *nisi* for dissolution of marriage on the ground of adultery can in no circumstance be granted when there is no evidence which the court can accept of the adultery alleged in the petition, upon which the relief is sought. Merely saying that the petitioner's wife had run away with another man whose name is not disclosed in the petition is not enough (*Ammana* v. *Mrs. Epsey Ammana*, A 1949 Mad 7). There is no provision in the Indian Divorce Act for the grant of decree of divorce on the ground of non-resumption of cohabitation for two years of separation. The anology under the Hindu Marriage Act or the Special Marriage Act cannot be applied (*Amarthala Hemalatha* v. *Dasari Babu Rajendra Veraprasad*, A 1990 AP 220 SB).

Mere allegation of adultery without giving details is not sufficient to establish the charge of adultery. (*Rajeev* v. *Baburao* A 1996 Mad 262). Although as a general rule the court would not act on an uncorroborated confession of adultery by the principal respondent, yet it is within the competence of the court to act on such admission and grant a decree for divorce (*Geyer* v. *Geyer*, A 1947 Lah 867). It would appear that mere adultery of the husband is no ground for dissolution of marriage,

3. That the said Samuel Robinson has never consummated the said pretended marriage by carnal copulation.

4. That, at the time of the celebration of your petitioner's said pretended marriage, the said Samuel Robinson was, by reason of his impotence, legally incompetent to enter into the contract of marriage.

5. (*Allegation about the petitioner being a Christian*).

6. That the said Samuel Robinson and the petitioner both reside in the city of Calcutta within the jurisdiction of this court.

7. (*Allegation of absence of collusion, etc.*).

Your petitioner, therefore, prays that this court will declare that the said marriage is null and void.

No. 102—Petition by Husband for a Decree of Nullity of Marriage

1. That, on the 15th day of July, 1990, your petitioner then a bachelor, aged thirty years, was married in fact, though not in law, to the respondent Catherine Bray, since falsely called Catherine Robinson, at the .....Church, Calcutta.

2. That from the said 15th day of July, 1990, until August 4, 1995, your petitioner lived and cohabited with the said respondent at diverse places, and particularly at No.....Ramsay Street, Dacca, and that your petitioner and the said respondent have had no issue of their said pretended marriage.

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unless it is either incestuous,or is accompained by bigamy of marriage with another woman, or is coupled with cruelty, or desertion without reasonable excuse, for two years or upwards, but even mere adultery of the husband would entitle her to claim judicial separation. A wife who has got sufficient grounds for petitioning for dissolution should carefully consider whether to apply for dissolution or for judicial separation only, because if she applies for the latter she cannot subsequently apply for the former without a fresh offence having been committed (*Manjula* v. *Janaji*, A 1940 Mad 510).

"Cruelty" does not mean merely physical cruelty and studied neglect or a course of degradation may amount to cruelty (*Stuart* v. *Stuart*, 96 IC 932, 53 C 436, A 1926 Cal 864 DB; see also *Asha* v. *Baldev*, A 1985 Del 76; *Kalpana* v. *Surendra*, A 1985 All 253; *Shanti* v. *Raghav*, A 1986 Raj 13; *Kamini* v. *Mukesh*, A 1985 Bom 221; *Sri Krishna* v. *Alok Ranjan*, A 1985 Cal 431). Dwelling with another woman in adultery in the same house has been held to be "cruelty" (*Barkat Bibi* v. *Nawab*,

3. That before the celebration of your petitioner's said pretended marriage, the said respondent had, on June 4, 1987, been married to one James Wilson of No. ..... Somerset Street, Bombay, at the .....Church at Bombay, and at the time of the celebration of your petitioner's said pretended marriage the said James Wilson was living, and the marriage of the said respondent with the said James Wilson was then in force.

4. That your petitioner was, on the said July 15, 1990, wholly unaware of the fact of the respondent's said previous marriage with the said James Wilson.

A 1938 Lah 301, 175 IC 21). Cruelty is a conduct of such type that the petitioner cannot reasonably be expected to live with the respondant (*Keshavrao* v. *Nisha*, A 1984 Bom 413, FB,—a case under section 13 Hindu Marriage Act) and it need not be proved that there is danger to life, limb or health of the petitioner; causing mental agony is enough (*Balbir Kaur* v. *Dhir Das*, A 1979 P & H 162). Cruelty includes mental cruelty. Onus lies on the spouse alleging cruelty (*Prem Prakash* v. *Sarla*, A 1989 MP 326 SB). Petition by the husband for divorce lies only on the sole ground that the wife is living in adultery, (*Anil Kumar Mahasi* v *Union of India*, (1994) 5 SCC 704, (1994) 2 KLT 399; *Prem Prakash* v. *Sarla*, A 1989 MP 326 SB). Having illicit relations with another person amounts to mental cruelty and is a ground for divorce. Where one of the spouses makes false allegations about the character of other spouse in open court with intention to injure the reputation, it amounts to cruelty (*Vimla Ladkani* v. *Chandra Prakash Lakhani*, A 1996 MP. 86). Husband administering some drug for the purpose of miscarriage and physically torturing wife amounts to cruelty, and entitles a wife to a decree for dissolution of marriage (*K.P.Y.Siddhique* v. *Amina*, A 1996 Ker 140 DB). Impotency need not be absolute; even impotency of the respondent *qua* the petitioner would be enough (*Kanthy* v. *Harry*, A 1954 Mad 316 FB; *Vincent Adolf* v. *Jeme Beatrice*, A 1985 Bom 103). For the offence of bigamy, it must be proved that the second marriage has been performed according to recognised ceremonies (*Swapna Ghosh* v. *Sadananda Ghosh*, A 1989 Cal. 1 SB).

Lastly it should be alleged in such petitions that there is no collusion or connivance between the petitioner and the other party to the marriage (section 47). The mere fact that the wife's attorney had furnished certain documents to the petitioner's attorney or that they had subpoenaed the co-respondent is a very narrow ground for infering collusion (*Linton* v. *Guberian*, 56 C 530, A 1929 Cal 599 DB). All the facts including absence of connivance should be proved by the plaintiff even if the wife does not oppose the application. If there is delay, the same should also be explained by the husband (*Hartley* v. *Hartley*, A 1930 Cal 322, 124 IC 465).

5. That, at the time of the said marriage, your petitioner and the said respondent were, and still are, Christians.

6. That your petitioner and the said respondent last resided together at Calcutta within the jurisdiction of this court. Your petitioner now resides at Hooghly in India and the said respondent resides with her father at No....., Camac Street, Calcutta.

7. That there is no collusion between your petitioner and the said respondent with respect to the subject of this suit.

Your petitioner, therefore, prays that this court will declare that the said marriage is null and void.

Defence : In addition to the usual traverse of the grounds on which the petition is based, the respondent may show any of the circumstances mentioned in the proviso to section 14 e.g., the petitioner's own adultery, cruelty or desertion, etc., but if the petitioner is driven to a life of adultery by the husband's own conduct towards her, her adultery would be no defence (*Wilson-de-Roze* v. *Wilson-de Roze*, 57 C 891; *Nalini* v. *C.H.Issac*, A 1977 MP 266). It may be shown that the petitioner had condoned the adultery complained of or has been in any manner accessary to, or conniving at, the adultery (*B.D.Charles* v. *Nora Benjamin*, A 1979 Raj 156). Full particulars as to time, place, and occasion of the alleged *condonation* should be given, and the condonation should be *after* the alleged marital offence which is made the basis of the petition. Cohabitation after knowledge of a matrimonial offence operates as condonation of that offence (*Emmanuel* v. *Mandakini*, A 1946 Nag 69). But if there is a matrimonial offence after the condonation, the condonation goes and the original offence is revived. Wherever the respondent pleads condonation and the petitioner wants to show such a reviver of the previous conduct by another offence subsequent to the alleged condonation he should at once amend his petition by alleging the reviver and the particulars of the subsequent offence annulling the condonation. The court can, however, recognize the reviver even without amendment if evidence of subsequent offence is admitted (*Prem Chand* v. *Bai Galal*, 105 IC 871, 29 BLR 1336, A 1927 Bom 594, 51 B 1026 FB). The second offence which is set up as a reviver of the condoned offence need not be the like offence but it must be an offence of which a court can take cognizance, or it may be any misconduct (*Blackmore* v. *Blackmore*, 119 IC 220, A 1929 Rang 216, 7 R 313; *Viol Duncan* v. *George Duncan*, 184 IC 801, A 1939 Rang 352). Mere familiarity with another person, therefore, will not revive a condoned offence of adultery (*G.C. Foster* v. *A.B Foster*, 107 IC 184, 1 Luck 685, A 1928 Oudh 114).

Acquiescence is also a good defence. Where the husband sued two years after the adultery and during this time the wife lived with the co-respondent and the husband lived in comfort away from her, held that the husband's conduct

No. 103—Petition by Wife for Judicial Separation on the Ground of Husband's Adultery

1 to 3. *Same as in precedent No. 100.*

4. That on diverse occasions in or about the months of March, April and May, 1995, at No.....Chowringhee Road, Calcutta, the said Samuel Robinson committed adultery with Flora Jenkins, who was then

amounted to acquiescence in the injury complained of (*King* v. *King*, 57 C 215). But mere delay is no defence except that it will affect the quantum of damages (*Felisa E. Geyer* v. *M.M.Geyer*, A 1949 Lah 34). A wife sued for divorce may show husband's own adultery, as that is a fact which court can consider and in proper cases, though not in all, may refuse relief on such ground (*Ernest* v. *Anen*, 184 IC 110, A 1939 All 522).

Parties : The other party to the marriage sought to be dissolved is the only necessary party. But to a petition by the husband, the adulterer is also a necessary party. The only grounds on which the husband can be excused from impleading the adulterer are, that the wife is leading the life of a prostitute and the petitioner knows of no particular person with whom she has committed adultery, or that the alleged adulterer could not be known inspite of due efforts, or that he is dead. The petitioner should make an application to the judge, mentioning one of these grounds, and should obtain the judge's order excusing him from impleading the adulterer. Such application should be accompanied by an affidavit showing why the petitioner has been unable to identify or trace the adulterer and what efforts he has made to do so. This order should be obtained before the hearing of the petition (*Cox* v. *Cox*, 45 C 525; *K.Kumar Raju* v. *K.Umamaheswari*, A 1995 A.P. 222 SB).

Where an adulterer is impleaded, the petitioner may add a claim for damages against him. The woman with whom the husband has committed adultery is not a necessary party to a suit by the wife.

(2) Nullity of Marriage

No decree of nullity of marriage can be passed except where the marriage has been solemnized in India and the petitioner is resident in India at the time of presenting the petition (section 2). These facts must, therefore, be alleged. The petition can be based on one or more of the grounds mentioned in section 19, and such ground or grounds must be clearly alleged in the petition. The court has no power to pass a decree on any other ground under the guise of equity (*H.* v. *H.*, 30 BLR 523, A 1928 Bom 279, 110 IC 266 FB). The power to annul a marriage on the ground of fraud, e.g., a Muslim husband's representation that he was a Christian, is saved by section 19 itself (*Therisia* v. *Mustafa*, ILR (1939) 2 Cal 60, A 1940 Cal 75, 186 IC 593). Marriage can be annulled on the ground of impotency as regards wife, even if the husband is not impotent as regards other woman (*ibid*). An application for nullity on the ground of impotency of husband was dismissed

living in the service of the said Samuel Robinson and your petitioner, at their said residence at No.....Chowringhee Road, Calcutta.

5. That on diverse occasions between June 1, 1995, and June 15, 1995, the said Samuel Robinson at No..... Chwringhee Road, Calcutta, committed adultery with Emma Nesfield, wife of George Nesfield a guard in the employ of the Eastern Railway, who was then staying as guest of the said Samuel Robinson and your petitioner at their said residence,

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by compromise. A second application on the same ground was held to be barred (*ibid*). Impotency means incapacity to consummate the marriage and not merely infertility (*Majula* v. *Suresh*, A 1977 Delhi 93). Impotency must exist not only at the time of the marriage but also at the time of institution of petition (*Jecronimo Francisco Sacrafamulla Eric D' Souza* v. *Florence Martha D'Souza Nee Fernandes* A 1980 Delhi 275 FB). Marriage which may be declared a nullity for contravening provisions of section 19 may be invalid, but not necessarily void *abinitio* (*Rose Simpson* v. *Binimoy Biswas*, A 1980 Cal 214). Wife is entitled to a decree for nullity of marriage, if she proves the subsisting first marriage of the husband and also proves that the husband married her by misrepresenting that he was a bachelor, (*Mrs. Veena James* v. *Kewal Kishan James*, A 1982 P&H 47 FB). A petition for declaration that the marriage is nullity on the ground that the consent of the petitioner was obtained by fraud and deceitful means is maintainable before the High Court and not District Judge (*Vijayan* v. *Bhanusundari*, A 1995 Mad. 166 SB).

It should further be alleged that there is no collusion or connivance between the husband and the wife. Where the court declares under section 19, the marriage to be null and void, only one final decree should be passed (*Joseph Conan Sow* v. *Dorothy Smow*,1940 ALJ 31).

(3) Judicial Separation

Such decree can be passed on the application of the husband or wife, on the ground of adultery, or cruelty or desertion without reasonable excuse for two years or upwards. One or more of these grounds should, therefore, be clearly alleged with full particulars. The particulars necessary in case of adultery have already been mentioned. Each act of cruelty must be mentioned with date, place, etc., but if the acts have been almost continuous during a particular period, that period alone may be mentioned, thus, "on diverse occasions in the month of February." What particulars are necessary in case of desertion are mentioned below under "Protection Order". On desertion without just cause see *Dharam Dev* v. *Raj Rani*, A 1984 Del 389; *Bipinchandra Jaisinghbai Shah* v. *Prabhavati*, A 1957 SC 176. The consequence of such a decree is a limited one, viz. the wife is, whilst so separated, considered as an unmarried woman for the purposes of contract, wrongs and injuries and suing and being sued in any civil proceeding, and with respect to property which she may acquire or inherit (sections 24 and 25). The

No.....Chowringhee Road, Calcutta.

6. That there is no collusion between your petitioner and her said husband with respect to the subject of this suit.

7. That the said Samuel Robinson and your petitioner both live in the town of Calcutta within the jurisdiction of this court.

Your petitioner, therefore, prays that this court will decree a judicial separation to your petitioner from her said husband by reason of his aforesaid adultery.

No. 104—Like Petition, on Ground of Cruelty

1. That on July 20, 1994, your petitioner was lawfully married to Henry Curtis at Bareilly.

2. That after her said marriage, your petitioner lived and cohabited with her said husband at Bareilly until December 20, 1995 when your petitioner separated from her said husband as hereafter more particularly mentioned, and that your petitioner and her said husband have had no issue of the said marriage.

3. That, since November 26, 1994, the said Henry Curtis habitually conducted himself towards your petitioner with great harshness and cruelty, frequently abusing her and beating her with his fists and with a cane.

4. That on March 26, 1995, the said Henry Curtis abused your petitioner in the coarsest and most insulting language at the house of George Wood at No....., Civil Lines, Bareilly.

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respondent may plead the applicant's adultery, as that is sufficient legal ground for rejecting the application (*John Henry Rhine* v. *Mobel Rhine*, 33 A 500, 8 ALJ 18).

(4) Protection Order

If a husband deserts his wife without a reasonable excuse, and the wife acquires property she may require an order to protect that property from her husband or husband's creditors. She may apply for such order, and should in her petition allege (1) the fact of desertion, (2) that the same was without reasonable excuse, (3) the time of the commencement of desertion, and (4) that the petitioner is maintaining herself by her own industry and property.

The consequence of such a protection order is the same as that of a judicial separation (section 31).

5. That, on morning of April 20, 1995, at their house at Bareilly, the said Henry Curtis violently assaulted your petitioner and dragged her out of the drawing room into the verandah and kicked her.

6. That, on the evening of June 17, 1995, the said Henry Curtis, while at his dinner table, without any provocation threw a knife at your petitioner, thus inflicting a severe wound in her right hand.

7. That, on the morning of June 20, 1995, when your petitioner's brother came to see your petitioner, the said Henry abused your petitioner in the filthiest language and threatened to kill her.

8. That on the afternoon of the said December 20, 1995, your petitioner, by reason of the great and continued cruelty practised towards her by her said husband, withdrew from the house of her said husband to that of her brother, at No....., Civil Lines, Bareilly, and has after that day lived separate and apart from her said husband, and has never returned to his house nor had cohabitation with him.

9. That the said Henry Curtis and your petitioner were at the time of the marriage, and still are, Christians.

10. That the said Henry Curtis and your petitioner both live in the town of Bareilly within the jurisdiction of this court.

11. That there is no collusion between your petitioner and her said husband with respect to the subject to the present suit.

Your petitioner, therefore, prays that this court will decree a judicial separation between your petitioner and the said Henry Curtis.

No. 105—Like Petition, on Ground of Desertion

1. That on August 20, 1985, your petitioner was lawfully married to Edward Burke at the .....Church at Agra.

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(5) Restitution of Conjugal Rights

See also precedent of plaint No. 260 *ante* and notes thereunder. Either the husband or the wife can make a petition for this relief when the other party has, without reasonable excuse, withdrawn from the society of the petitioner. The petition should allege the marriage and cohabitation, and subsequent withdrawal of the respondent from cohabitation without any just cause and should also allege that the withdrawal still continues.

Defence : If marriage is admitted, the only grounds on which the respondent can defend such a suit are those on which he or she could sue for judicial separa-

2. That after her said marriage, your petitioner lived and cohabited with the said Edward Burke at Agra until November 20, 1992 and that your petitioner and her said husband have had one/an issue of their said marriage, one son, named Charles Burke, aged four years.

3. That on the said November 20, 1992, the said Edward Burke deserted your petitioner against her wish and without reasonable excuse, and from that time down of the present, being for the space of two years and upwards, has continued to desert your petitioner.

4. *Same as para 5 in the precedent No.102.*

5. That your petitioner and the said Edward Burke last resided together at Agra within the jurisdiction of this court and your petitioner still resides at Agra.

Prayer (*Same as in the previous precedent*).

No.106—Petition for Protection Order

1, 2, 3 and 5. *Same as in the last precedent.*

4. That, since the desertion by her husband, the said Edward Burke, your petitioner has maintained herself by her own industry (*or*, on her own property), and has thereby and otherwise acquired certain property, consisting of the following :

(i) A house, being premises No.....on the Drummond Road, Agra.

(ii) Half share in *khasra* No.210 measuring 6 *bighas* 2 *biswas* situated in village Shamshabad, pargana and tehsil Kiraoli in the District of Agra.

The petitioner, therefore, prays for an order for the protection of her earnings and property acquired since the said November, 20, 1992, from

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tion or for a decree, for nullity of marriage (section 33). These grounds are mentioned in section 19 and 22.

(6) Damages for Adultery

A claim by husband for such damages may be joined to one for dissolution of marriage or for judicial separation, or may be made in a separate petition. The petitioner should allege the adultery with necessary particulars. In a suit by wife for judicial separation, the husband who is respondent can include in his written statement a claim for damages against the alleged adulterer of his wife (*Mrs. Merely Norun* v. *Henry Donald Natt*, A 1948 All 326).

the said Edward Burke, and from all creditors and persons claiming under him.

No. 107—Petition by wife for Restitution of Conjugal Rights

1 and 2. *Same as in precedent No. 105.*

3. That the said Edward Burke did on the said November 20, 1992, withdrew from cohabitation with your petitioner and has ever since, without any just cause, kept and continued to keep away from her and has also refused, and still refuses, to render conjugal rights.

4 and 5. *Same as in the precedent No. 105.*

Your petitioner, therefore, prays for a decree that the said Edward Burke do take home and receive your petitioner as his wife and render to her conjugal rights.

RESPONDENT'S ANSWERS

No. 108—Respondent's Statement in answer to Petition No. 99

Catherine Robinson, the respondent, by Ahmad Karim, her advocate, in answer to the petition of Samuel Robinson, says that she denies that she had on diverse, or any, occasions, committed adultery with Henry Jackson, as alleged in para 3 of the said petition.

Wherefore the respondent prays that this court will reject the said petition.

No. 109—Co-respondent's Statement in Answer to Petition No. 99

Henry Jackson, the co-respondent, in answer to the petition filed in this court, says that he denies that he committed adultery with the said Catherine Robinson as alleged in para 3 of the said petition or at all.

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(7) Costs

An application by the wife for an order directing the husband to pay to her a sum of money in order to enable her to meet the expenses incidental to the defence of the suit for dissolution of marriage is maintainable under section 7. She is entitled to an order against her husband for payment of her costs to arrange for her defence (*Lewis* v. *Lewis*, A 1949 Mad 877).

Wherefore the said Henry Jackson prays that this court will reject the prayer of the said petitioner and order him to pay the costs of, and incident to, the said petition.

No. 110—Statement in Answer to Petition No. 103

Samuel Robinson, the respondent, by Ram Prasad, his advocate, says :

1. That he denies that he committed adultery with Flora Jenkins as alleged in para 4 of the petition or at all.

2. That the petitioner condoned the said adultery with Flora Jenkins, if any.

3. That he denies that he committed adultery with Emma Nesfield as alleged in para 5 of the petition or at all.

4. That the petitioner condoned the said adultery with the said Emma Nesfield, if any.

PETITIONS UNDER THE HINDU MARRIAGE ACT *(zz)*

No. 111—Hindu Wife's Petition for Dissolution of Marriage by Divorce (section 13)

(See precedent No. 113 also as the grounds for divorce and judicial separation are now identical excepting two additional grounds mentioned in section 13 (1-A) for divorce).

IN THE COURT OF THE DISTRICT JUDGE OF KANPUR

Smt. Champa, daughter of Prem Narain, resident of house No. 1502, Phool Bagh, Kanpur. ... ... *Petitioner*

Versus

Ram Das s/o Bhikari Das, resident of house No. 107/23, Lal Bagh, Lucknow. ... ... *Respondent*

The aforesaid petitioner respectfully submits as follows :

(zz) Proceedings in court under the Hindu Marriage Act (25 of 1955), including claims for restitution of conjugal rights (section 9) (*Vikram Singh* v.

1. That on January 4, 1982, the petitioner was married to Ram Das, respondent, at Kanpur.

2. That at the time of the marriage, the petitioner and said Ram Das were, and still are, Hindus.

3. That the parties have two issues of the said marriage, viz. Krishna Das (a son aged 14 years) and Pushpa (a daughter aged 10 years).

4. That the petitioner and respondent last resided together in February 1993 at Lal Bagh in Lucknow.

5. That the respondent has after the solemnization of the marriage, had voluntary sexual intercourse with one Smt. Ram Piari, as per particulars given below:

(*Or*, has embraced Christianity (*If this be the grounds omit in para. 2 "and still are"*)

(*Or*, has been incurable of unsound mind);

(*Or*, has been suffering from a virulent and incurable form of leprosy);

(*Or*, has been suffering from syphilis in a communicable form, the disease having been contracted from some one other than the petitioner);

(*Or*, has renounced the world and became a *sadhu*);

(*Or*, has not been heard of as being alive for over seven years by those persons who could naturally have heard of it had he been alive (*In such cases the date of last residing together should be more than seven years remote from the date of petition*);

(*Or*, has married Smt. Padmini after his marriage with the petitioner and that wife is still alive);

(*Or*, has after his marriage with the petitioner been guilty of rape (*or*, sodomy or bestiality), as per particulars given below):

Sudershan Singh, A 1961 All 150) commence, like corresponding proceedings under the Indian Divorce Act (4 of 1869), by means of petition and not by presentation of the plaint. Broadly speaking the petitions under the Hindu Marriage Act are to be drafted on the same lines as those under the Indian Divorce Act (vide notes under precedents No. 99 to 110 *ante*). The two Acts use several identical expressions, such as "cruelty", "desertion", "adultery" "cohabitation", "collusion", "condonation", "last resided together", "impotency". Hence case law on any one

(*Or*, has not resumed cohabitation for a period of over one year after decree No.713 of 1994 which the petitioner obtained against him for judicial separation);

(*Or*, has failed to comply for over one year with decree No.715 of 1994 for restitution of conjugal rights which the petitioner obtained against him).

Excepting last two grounds given above, all other grounds for divorce and of judicial separation are now common.

6. That there is no collusion between the petitioner and the respondent, and that the petitioner has neither condoned nor connived at the respondent's conduct.

The petitioner, therefore, prays that the court may be pleased to dissolve the petitioner's marriage with the respondent.

No. 112—Hindu Wife's Petition for Nullity of Marriage (section 11 and 12)

1 to 4. *Same as in precedent No.111.*

Act will be useful for proceedings under the other. Some of the points of difference are noted below. (On divorce among Muslims, see notes on plaints in suits under Mahomedan Law *ante*).

Mental Cruelty can be ground for divorce (*P.C.Mohanan* v.*K.E.Thankamani*, 1995 AIHC 2259 (Ker) DB). Wife throwing child into well, resulting in death, amounted to mental cruelty). Wild allegations imputing adulterous conduct on the other spouse without any basis would constitute cruelty. Mental cruelty is that conduct which inflicts upon the other party such mental pain and suffering as would make it difficult for that party to live with the other. Mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together (*V.Bhagat* v. *Mrs. D. Bhagat*, A 1994 SC 710, 1994 A SCW 45, (1994) 1 SC J 62; *Jayakrishna* v. *Smt. Sureka*, 1995 (3) ALT 207 (AP) DB). Making false allegations by wife in open court about the character of the husband and the family members so as to injure the reputation of the husband amounts to cruelty (*Vimla* v. *Dr. Chandra Prakash*, 1995 MPLJ 975 MP). Continuous demand of dowry from the wife in her matrimonial home amounts to 'cruelty' entitling a wife a decree for divorce (*Sobha Rani* v. *Madhukar Reddi*, A 1988 SC 121; *Pushpa Rani* v. *Vijapai Singh*, A 1994 All 216).

Petitions under the Hindu Marriage Act lie in the District Court within the local limits of whose ordinary civil jurisdiction the marriage was solemnized or the husband and wife reside or last resided together. On the meaning of "last resided together" see *Pritma* v. *Mohinder*, A 1984 P & H 305; *Saroja* v. *Ennamval*, A 1965

5. That the respondent had a wife living at the time of the marriage.

(*Or*, That the respondent is the brother of the petitioner's deceased husband and there is no custom or usage governing each of the parties permitting of a marriage between them, and as such the parties are within prohibited degrees of relationship);

(*Or*, That the respondent is the petitioner's mother's brother and there is no custom or usage governing each of the parties permitting of a marriage between them, and as such parties are *sapindas* of each other);

(*Or*, That the parties marriage has not been consummated owing to the impotence of the respondent);

(*Or*, That the respondent was at the time of marriage incapable of giving a valid consent to it in consequence of unsoundness of mind);

(*Or*, That the petitioner's consent to marriage was obtained by the respondent by putting the petitioner in fear of death as per particulars given below. The petitioner secured her release from the respondent's custody only two months ago and has not during the said period of two months lived with him as wife);

(*Or*, That the petitioner's consent to marriage was obtained by the respondent by falsely representing to her that he was a graduate. (*Particulars of fraud must always be given*) The petitioner discovered two months ago that the respondent is not even a matriculate. Since this discovery the petitioner has withdrawn herself from respondent's company and has not lived with him as his wife.

Mys 12; *Jagir Kaur* v. *Jaswant Singh*, A 1973 SC 152. But unlike the proceedings under the Indian Divorce Act, the decisions of the District Court do not stand in need of confirmation by High Court. Customary divorce without resort to court, prevalent among certain communities, does not stand abolished by the Hindu Marriage Act (*Balvinder Singh* v. *Gurpal Kaur*, (1985) 1 SCC 23).

The term 'District Court' means, in any area for which there is a city civil court, that court and in any other area the principal civil court of original jurisdiction, and includes any other civil court which may be specified by the State Government, by notification in the official Gazette, as having jurisdiction in respect of the matters dealt with in the Act (In U.P., courts of Civil Judge has been empowered, and appeals from their decisions lie to the District Judge and not to the High Court).

A petition under the Act should be verified like a plaint and should contain a statement to the effect that there is no collusion between the petitioner and the other party to the marriage.

6. *Same as in precedent No.111.*

Your petitioner, therefore, prays that this court will declare that the said marriage as null and void.

No. 113—Hindu Wife's Petition for Judicial Separation (section 10)

(*See precedent No.111 also as the grounds for divorce and for Judicial separation are now common except that there are two additional grounds for divorce as indicated in that precedent*).

1-4. *Same as in precedent No.111.*

5. That the respondent has deserted the petitioner for a continuous period of over two years immediately preceding the presentation of the petition, as per particulars given below :

(*Or*, (i) That on November 5, 1994 the respondent abused the petitioner in a very filthy language at his house in the presence of guests and relations and that on the petitioner's protest the respondent kicked the petitioner and gave her a beating.

(ii) That the petitioner is since then living with her brother and has serious apprehension that she will again be beaten, abused and otherwise maltreated if she goes back to the respondent's house);

(*Or*, That the respondent has been suffering from a virulent and incurable form of leprosy);

(*Or*, That the respondent has been suffering from syphilis in

Before proceeding to grant any relief under the Act, it is the duty of the court in the first instance, in every case in which it is possible to do so consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconcilation between the parties. In all proceedings under the Act, whether defended or not, the court should, before granting the relief, be satisfied that the petitoner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, that the petitioner has not been accessory to, and has not condoned or connived at, the other party's unchastity, has not condoned the other party's cruelty, that the petition is not collusive and that there has been no unnecessary or improper delay. The court may, and if any party so desires shall, conduct the proceedings in camera. **No petition for dissolution of marriage can normally be presented until after the expiry of one year from the solemnization of marriage.** But the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, entertain a petition for

communicable form, the disease having been contracted from some one other than the petitioner);

(*Or*, That the respondent has been suffering continuously [*or*, intermittently] from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent);

(*Or*, The respondent after his marriage with the petitioner has voluntarily had sexual intercourse with Smt. Ram Piari, a servant of the respondent, as per particulars given below :

6. *Same as in precedent No. 111.*

The petitioner prays that this court will grant judicial separation to the petitioner from the respondent.

No. 114—Hindu Wife's Petition for Restitution of Conjugal Rights (section 9)

1-4. *Same as in precedent No. 111.*

5. That in February, 1993 respondent withdrew from cohabitation from the petitioner and has ever since, without any cause, kept away from the petitioner and has not rendered conjugal obligations.

6. That there is no collusion between the parties and that the petitioner has neither condoned nor connived at the respondent's conduct.

The petitioner prays that this court will order restitution of conjugal rights to the petitioner by directing the respondent to come over to the petitioner and render marital obligations to her.

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divorce before the expiry of the aforesaid period of one year, if the case is of exceptional hardship to the petitioner or of exceptional depravity on the part of respondent. The expressions "exceptional hardship" is not limited to past hardship but includes present and future hardship as well (*Fay* v. *Fay*, (1982) 2 All ER 922). But if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of one year from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

No. 115—Hindu Husband's Petition for Dissolution of Marriage (section 13)

[*This petition is to be drafted mutatis mutandis, on the lines of precedent of 111, except that 8th and 9th ground given in para 5 shall not apply*].

No. 116—Hindu Husband's Petition for Nullity of Marriage (section 11 and 12) *(aaa)*

(*This petition is to be drafted, mutatis mutandis, on the lines of precedent No.112. The following additional ground will, however, be available to the husband*).

That the respondent was pregnant at the time of marriage from some person other than the petitioner, and this fact was not known to the petitioner at that time.

That the petitioner has refrained from marital intercourse since the discovery of the fact.

When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again. Provided that it shall not be lawful for the respective parties to marry again unless at the date of such marriage, at least one year has elapsed from the date of the decree in the court of the first instance (section 15). There is no bar against the divorced persons marrying each other after the expiry of the aforesaid period.

During pendency of any proceeding under the Act, the Court may under section 24 allow to the party which has no independent income sufficient for her or his support and the necessary expenses of the proceeding or such expenses and monthly maintenance for the other party as it may deem reasonable. There is conflict of judicial opinion as to whether such maintenance is allowable from the date of commencement of the original proceeding or from the date of an application under section 24.

(aaa) For husband's petition for nullity of marriage on the ground that the respondent was pregnant at the time of the marriage by some person other than the petitioner the proceedings must commence within one year from the date of the marriage.

Defence: In a husband's petition for divorce on the ground of non-resumption of cohabitation after a decree for restitution of conjugal rights the respondent wife may plead that the petitioner himself was responsible for not allowing the respondent to resume cohabitation and vide section 23 (1) (a), cannot take advantage of his own

No. 117—Hindu Husband's petition for Judicial Separation (section 10)

(This petition is to be drafted, mutatis mutandis, on the lines of precedent No. 113).

No. 118—Hindu Husband's Petition for Restitution of Conjugal Rights (section 9)

(Paras 1-4 are to be drafted mutatis mutandis on the lines of paras 1-4 of precedent No. 111).

5. That in February 1993 respondent's brother took her away from the petitioner's house by making a representation that the respondent's younger sister was to be married in the following month.

6. That the respondent has not returned to the petitioner's house notwithstanding the fact that the petitioner went several times to bring her home.

7. That without any cause the respondent is refusing to perform her marital obligations.

8. That there is no collusion between the parties and that the petitioner has neither condoned nor connived at the respondent's conduct.

"wrong" (*Manmohan* v. *Smt. Kailash Kumari*, A 1984 J & K 59). The "wrong" of the petitioner must, however, be something more than mere disinclination to agree to an offer of reunion; it must be serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled (*Saroj Rani* v. *Sudarshan*, (1984) 4 SCC 90). Wife can refuse to live with the husband, if she is able to prove that she was being treated with cruelty or there is a reasonable apprehension in her mind that it will be harmful and injurious for her to live with the husband (*Pushpa Rani* v. *Vajapai Singh*, A 1994 All 216).

In a petition for divorce or judicial separation or nullity, the defence may consist either of a denial of the allegations against the respondent or of a plea that the facts alleged do not amount to a statutory ground for the petition. A plea of desertion may be countered by a plea that the petitioner's own cruelty had compelled the respondent to live apart and that there was no *animus deserendi* (*Rukmini* v. *P.M. Srivivasa*, A 1984 Karn 131). However, if one spouse deserts, it is not the duty of the other to try to effect reconciliation; nor is it necessary that *animus deserendi* should commence simultaneously with living separately, it can commence later (*Bharat Lal* v. *Smt. Ram Kali*, A 1984 All 274). Condonation may also be a good defence, but it comprises of two things, namely, forgiveness of the offence and

This petitioner prays that the court will order restitution of conjugal rights to the petitioner by directing the respondent to come over to the petitioner's house and render marital obligation to him.

No. 119—Petition for Divorce by Mutual Consent *(bbb)*

In re :

1. Prakash Chandra son of, etc.....

and

2. Smt. Rashmi wife of Prakash Chandra, etc.....

—Petitioners.

Petitioners above named state as follows:

1. Petitioners who are Hindus were married according to Hindu rites on 10th February, 1980 at the residence of Sri Mahesh Chandra father of petitioner No.2 at 10, Civil Lines, Dehra Dun.

2. Petitioners thereafter lived as husband and wife at the residence of petitioner No.1 at Meerut within the jurisdiction of this Court for over ten years.

3. Due to certain reasons which petitioners need not set out, strains developed in the mutual relations between the petitioners, and ultimately petitioner No.2 left the house of the petitioner No.1 on 15th April 1990 and has not returned since.

4. Petitioners have thus been living separately for a period of five years and have not been able to live together during this period.

5. Considering all the circumstances including the interest and welfare

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restoration of the offending spouse to the same position as he or she occupied before (*K. Sarbadhikary* v. *A.R. Sarbadhikary*, (1985) 89 CWN 156). Delay in filing the petition may also indicate condonation of adultery or cruelty, but in cases of desertion it may merely show patience of the petitioner (*Rukmini* v. *P.M. Srinivasa* 131).

(bbb) Section 13 B, inserted by Act No. 68 of 1976, provides for divorce by mutual consent. Three grounds are required for a joint petition in this behalf, namely: (i) that the parties have been living separately for a period of one year or more, (ii) that they have not been able to live together, and (iii) that they have mutually agreed that the marriage should be dissolved. As it will be a joint agreed petition no other grounds, such as reasons for disharmony between them, need be set out. Indeed it will not be practicable to do so, for parties are likely to disagree on the same as none would agree to accept the blame for the breakdown of the marriage. In

of their children the petitioners have mutually agreed that their marriage should be dissolved.

6. Parties have agreed in regard to the custody, maintenance and education of their children as follows:

(a)

(b)

(c)

Petitioners pray for a decree for divorce declaring their marriage to be dissolved with effect from the date of the decree.

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a view of ground as (i) aforesaid it is obvious that the discretion of the court under section 14 to entertain a petition for divorce even before the expiry of one year from the marriage in case of exceptional hardship will not be available for exercise in respect of petitioner under section 13 B. If there are any children by the marriage it will be proper and expedient to incorporate some agreed provisions about their custody, maintenance and education. Unless this is done the Court will have to exercise its jurisdiction under section 26, and if the parties do not agree they may have to enter into a contest in that regard.

The mere filing of such a petition does not authorise the Court to make decree for divorce. There is a period of waiting from 6 to 18 months. This period is intended to give time and opportunity to the parties to reflect upon their move. A party to the petition can unilaterally withdraw the consent, the mutual consent spoken by the Section must continue till divorce decree is passed in the case (*Sureshta Devi* v. *Om Prakash*, A 1992 SC 1904).

The expression "have not been able to live together" indicates concept of broken down marriage and no possibility of reconciliation. The expression "living separately", connotes not living like husband and wife. It has no reference to the place of living. The parties may be living under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that mental attitude they have been living separately for a period of one year immediately preceeding the presentation of the petition (*Sureshta Devi* v. *Om Prakash*, A 1992 SC 1904).

CLAIMS UNDER MOTOR VEHICLES ACT, 1988.

No. 120—Form of Application for Compensation for Motor Accident Claims *(ccc)*

(*See* Rule 3 of U.P. Motor Accidents Claims Tribunals Rules)

To

The Motor Accidents Claims Tribunal,

.....

I.....son/daughter/widow of.....residing at.....having been injured in a motor vehicle accident hereby apply for the grant of compensation for the injury sustained. Necessary particulars in respect of the injury, vehicle etc., are give below :

Or

I.....widow of.....residing at..... hereby apply as a legal representative, for the grant of compensation on account of death of Sri.....son of Sri.....who died in a motor vehicle accident. Necessary particulars in respect of the deceased and the vehicle etc., are given below:

1. Name and Father's name of the person dead .
2. Full address of the person dead.
3. Age of the person dead.
4. Occupation of the person dead.
5. Name and address of the employer of the deceased, if any.
6. Monthly income of the person dead.

(ccc) Sections 165 to 176 of the Motor Vehicles Act, 1988 provide procedure for award of compensation in claims arising out of motor vehicles accidents. No formal plaint is required to be filed in the civil court. Instead an application is required to be given to the Claims Tribunal. *Ad valorem* court fee is not required: only token court fee is payable even on claims of heavy amounts. A claim petition may be filed by the claimant before the Claim Tribunal (i) within whose jurisdiction

7. Name and age of each of the dependents of the deceased indicating relationship with him, and also monthly average income of the deceased and the source of such income.

8. Does the person in respect of whom compensation is claimed pay income-tax ? If so, state the amount of income-tax (to be supported by documentary evidence).

9. Place, date and time of the accident.

10. Name and address of police station in whose jurisdiction the accident took place or was registered.

11. Was the person in respect of whom compensation is claimed travelling by the vehicle involved in the accident? If so, give the names of places of starting of journey and destination.

12. Nature of injuries sustained.

13. Name and address of the Medical Officer/Practitioner, if any, who attended on the dead.

14. Period of treatment and expenditure, if any, incurred thereon (to be supported by documentary evidence).

15. Registration number and the type of the vehicle involved in accident.

16. Name and address of the owner of the vehicle.

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the accident occured, (ii) within the local limits of whose jurisdiction claimant resides or carries on business or (iii) within the local limits of whose jurisdiction the defendant resides (Amendment Act 54 of 1994).

Although the award of the Tribunal is executable is the same manner as a decree of the court and although various provisions of the C.P.C. have also been applied to proceedings before the Claims Tribunals by various rules made by the various State Governments under section 176 of the Motor Vehicles Act, the provisions of Orders VI, VII and VIII C.P.C. have not been applied. Instead of a formal plaint, a claim in a tabular form which is prescribed by rules made by various State Governments is required to be filed before the Tribunal.

No statutory form is prescribed for a written statement. However, the written statement can also be filed with reference to different particulars mentioned in the tabular form of the claim. The admissions and denials can be recorded against item numbers of the tabular form treating each item number as if it were a paragraph of the plaint. It may thereafter be followed by "Additional Pleas" just as in the case of a written statement filed under Order VIII. While drafting a claim, the form prescribed

17. Name and address of the insurer of the vehicle.

18. Has any claim been lodged with the owner/insurer; if so, with what result.

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in a particular State or Union Territory by the Local Government concerned should be followed. The form prescribed in U.P. has been reproduced herein. The forms prescribed in other States are more or less similar with minor variations. The local rules should, however, be consulted before filing a claim so that there may be no breach or omission.

Originally, the limitation period for filing claim petitions under the Act of 1988 was six months, which on sufficient cause being shown could be extended to 12 months. In any event, this period of 12 months could not be extended in any case. By Amendment Act 54 of 1994 brought into force with effect from 14.11.1994 sub-section (3) of section 166 stands deleted and the resultant position is that after this amendment there is no limitation under the Motor Vehicles Act 1988. The Law of limitation as prevailing at the time of the institution of the claim petition should be applied and not the law prevailing at the time of the accident (*B. Venkamma* v. *D. Narisi Reddy*, 1995 (3) ALT 317 (AP).

The tribunals and courts generally take a sympathetic view so far as the case of the victims and their dependants is concerned and view the pleadings of claimants less strictly than those of defendants (*N.Siwammal* v. *Pandian Roadways Corpn.*, (1985) 1 SCC 18, para 4). However, it will not be safe for a pleader to take such sympathy for granted, and expediency demands that full and proper factual particulars, to the extent known, are given in the first instance and adequate explanation be given for any omission or for any late furnishing of particulars. Likewise, a break-up of different heads of damages, with relevant particulars pertaining thereto, should be given.

Tribunal is not only required to assess compensation and direct the payment thereof, but also is an adjudicator of social justice and required to see that the compensation is properly utilised and man suffering is not deprived of the compensation awarded and would not be spending away the same because he was getting lump sum by making proper arrangement for the amount payable (*Union of India* v. *Preetam Singh*, 1995 ALR 20 (All) (DB).

The provisions of the Fatal Accidents Act (No. 13 of 1855) and the Legal Representatives Act (No. 12 of 1855) are *mutatis mutandis* applied to these claim proceedings (see notes under precedents of plaints No. 202 and 203 for these Act). However Punjab & Haryana High Court has held that in view of section 110 A (old Act of 1939) even legal representatives and dependants other than those enumerated in section 1 of the Fatal Accidents Act can maintain such claim petition (*Parkash Chand* v. *Pal Singh*, A 1985 P & H 329, FB; distinguished, *Hari Chand* v. *M.C.D.*, A 1981 Del 71; *Ramesh Chandra* v. *MPSRTC*, A 1982 MP 165; *Pushpa* v. *State of J & K*, 1977 ACJ 375; *Motilal* v. *Gurbachan*, 1980 ACJ 462 All, and *N.I. Insurance Co.* v. *Shanti Misra*, A 1976 SC 237).

19. Name and address of the applicant.

20. Relationship with the deceased.

The principles of law of tort of negligence and of vicarious liability for tort are applied. Parliament has, however, provided for payment of a limited amount of compensation even where no negligence of the owner or driver of the motor vehicle is proved, vide sections Secs 140 to 144 of Motor Vehicles Act, 1988 (Secs. 92 A to 92E of the old Motor Vehicles Act, 1939). The insurer should also invariably be joined as defendant so that at least a limited amount (section 147) may easily be recoverable. Section 140 of the Motor Vehicles Act entitles a person to claim no fault liability amount without proof of negligence of the driver or the owner (*G.S.R.T. Corporation Ahmedabad* v. *Ramanbhai*, A 1987 SC 1690). On the death of the claimant, the claim regarding damages on account of pains, suffering and mental agony to the deceased will not survive, but the claim regarding loss to the property will survive and the legal representatives of the deceased can continue the claim petition (*Naseeban* v. *Surendra Pal*, A 1996 Raj 91).

Where the name of the insurer is not known to the claimant, interrogatories and discovery should be applied for and the transport authorities' records can also be summoned for ascertaining these particulars with reference to the registration number of the vehicle if known. Where the respondent alleges that some third person and not he is the owner of the vehicle, such third person must be made party to the claim petition (*Leelabai* v. *M.U.K. Nair*, (1989) ACC 286 MP).

In a case of accident caused by tyre burst (*Amruta Dei* v. *State of Orissa*, 1982 ACJ 24) or sudden mechanical breakdown or sudden skidding of the vehicle (*A.P.S.R.T.C.* v. *Sridhar Rao*, 1981 TAC 29; *Swarnalata* v. *Joginderpal*, 1970 ACJ 7; *Oriental Insurance Co.* v. *Satya Dev*, 1981 TAC 177; *Gobald Motor Service* v. *Veleeswami*, A 1962 SC 1). In the absence of any unexpected development, it was for the driver to have explained how the accident happened and in the absence of such explanation the principle of *res ipsa loquitur* (the thing speaks for itself) would apply (*Basthi Kasim Saheb* v. *Mysore SRT Corpn.*, A 1991 SC 487).

Vicarious Liability : If the negligence of the driver or other servant is established or presumed and the servant had acted in the course of his employment, the master is vicariously liable, even though the master may have instructed the driver to be careful, and not to be negligent (*Gobald Motor Service* v. *Veleeswami*, A 1962 SC 1; *Pushpabai Udeshi* v. *Ranjit Ginning Co.*, A 1977 SC 1735, (1977) 2 SCC 745). There is a presumption that a vehicle is driven on master's business and by his authorised agent or servant, though the presumption is rebuttable (*Mannalal* v. *State*, A 1985 MP 263). But the master will not be liable if the servant was stealthily taking the vehicle on a frolic of his own without being at all on his master's business (*Gobald*, supra) or if he was taking an unauthorised passenger in violation of the statutory regulations (*Jiwandas Roshanlal* v. *Karnail Singh*, 1980 ACJ 445; *Sivagami* v. *Mahaboob Nisa Bi*, 1981 ACJ 399, (1981) 1 MLJ 375; see also *M Kandaswami* v. *Chinn[illegible]amy*, A 1985 Mad 290). Where accident has been

21. Title to the property of the deceased.

22. Amount of compensation claimed.

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caused by the proprietor of a garage or workshop to which the car had been entrusted for repairs, such proprietor being an independant contractor and not servant, the owner of the vehicle is not liable (*Devinder Singh* v. *Mangal Singh*, 1981 ACJ 448).

Government's immunity from liability for tortious acts of its servants is confined only to those activities which are part of the sovereign functions of the State. In interpreting what are such activities the courts are now increasingly taking a view more favourable to the citizen than to government. Thus government has been held liable even when the vehicle belonged to the Border Security Force (*Union of India* v. *Abdul Rahman*, A 1981 ACJ 348 J & K ; *Commandant* v. *Pankajini*, A 1984 Cal 405); also in case of an ambulance van transporting a victim of stabbing (*State of Tamil Nadu* v. *Shamsuddin*, 1981 ACJ 244, (1981) 1 MLJ 17, 1981 TAC 520); another department's vehicle being sent to police department for urgent police duties (*Chief Secretary* v. *Chockalingam*, 1981 TAC 175); military truck carrying ration for soldiers (*Rajiv Kumar* v. *Union of India*, 1981 TAC 526). The Orissa and Andhra Pradesh High Courts have gone further and held that government is liable even where the vehicle was being used in connection with sovereign functions (*Amruta Dei* v. *State of Orissa*, 1982 ACJ 24 following *Government of A.P.* v. *Padma Rani*, ACJ 462). Vicarious liability of the State for the negligent acts of its officers, see *N.Nagendra Rao & Co.* v. *State of A.P.*, A 1994 SC 2663).

Insurer may in his defence plead and prove that the insurance policy covered only Act liability and not unlimited liability; as the terms of the policy are in its own special knowledge a presumption may be raised against it if the policy is not proved (*National Insurance Co.* v. *Narendra Kumar*, A 1980 All 397; following *Shaikhupura Transport Co.* v. *N.I.T. Insurance Co.*, A 1971 SC 1624; and distinguishing *Jayalakshmi* v. *Ruby Insurance Co.*, A 1971 Mad 143 (FB); see, however, *Concord of India* v. *Inacio*, 1980 ACJ 514 Goa). In case of comprehensive insurance the liability of the insurer is unlimited (*Oriental Insurance Co.* v. *Ganapathi*, 1981 M 299). Even where the contractual liability fixed is lesser than the statutory liability, the Insurance company is bound to pay compensation upto statutory liability (*Oriental Insurance Co. Ltd.* v. *G. Padmawati*, 1995 AIHC 3184 (Bom) (DB). For payment of no fault liability compensation, absence of negligence on the part of the person suffering injury or permanent disability or death, is not a condition precedent (*K. Nandakumar* v. *Managing Director, Thanthal Periyar Transport Corporation*, 1996 (2) SCC 736). The liability of the insurer for "any one accident", as mentioned in section 95 (2) (a) of Motor Vehicles Act of 1939 (section 147 (2) of Act of 1988) has been so interpreted that there are as many accidents as persons involved, i.e., victims (*Motor Owners Insurance Co.* v. *Jadavji K. Mode*, A 1981 SC 2059).

Insurer is not liable if the driver of the vehicle was neither the person insured nor his servant (*Shankar Rao* v. *Babulal*, A 1980 MP 154) or if he had no regular

23. Any other information that may be necessary or helpful in the disposal of the claim.

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driver's licence (*Ambujam* v. *N.I.Ins. Co.*, 1981 ACJ 175, (1980) 2 MLJ 570). There is conflict of opinion on onus regarding proof of licence (*N.I.Ins. Co.* v. *Sugantha*, 1981 ACJ 302, (1980) 2 MLJ 572: on insurer; *N.I.Ass. Co.* v. *Sushila Devi*, 1981 ACJ 119 Raj : on insurer; *Anand Ins. Co.* v. *Hasanali*. 1975 ACJ 471 MP : on claimant). Whether driver was holding valid licence, onus lies on the driver to prove (*Oriental Insurance Co. Ltd., Patiala* v. *Paro*, 1995 AIHC 2586 (P & H) overruled *New India Assurance Co. Ltd.* v. *Surender Paul*, 1990 (1) PLR 318).

Where a driver is having learner's licence, he cannot be regarded as a duly licensed driver. The Insurance Company held not liable for compensation (*New India Assurance Co. Ltd.* v. *Mandar Madhav Tambe*, A 1996 SC 1150, (1996) 2 SCC 328).

While fixing an amount of compensation payable to a victim of an accident, the damages have to be assessed separately as pecuniary damages and special damages. Pecuniary damages are those which the victim has actually incurred and which are capable of being calculated in terms of money, whereas non-pecuniary damages are those which are incapable of being assessed by arithmetical calculations. Pecuniary damages include expenses incurred by the claimant :

1. Medical attendance;
2. Loss of earning of profit upto the date of trial;
3. Other material loss.

Non-pecuniary damages may include :

(i) damages for mental and physical shocks, pain, suffering, already suffered or likely to be suffered in future;

(ii) damages to compensate for the loss of amenities of life;

(iii) damages for the loss of expectation of life;

(iv) inconvenience, hardship, discomfort, disappointment, frustration and mental strain in life.

Damages in case of injury may be claimed for pain and suffering (*K.A. Kurup* v. *Surumaran*, 1980 TAC 444; *Deepi Tewari* v. *Banwarilal*, 1966 ACJ 217) apart from compensation for medical expenses and for loss of earning (*Rajasthan S.R.T.C.* v. *Om Prakash Gupta*, 1982 TAC 34 (Raj), 1981 ACJ 332; *Ayub Yusufbhai* v. *Prabhudas*, 1981 ACJ 166 Guj; *Bhupendra Kumar* v. *O.N.G.C.*, (1981) 2 LLJ 126 Guj). In case of death the dependants mentioned in section 1 of the Fatal Accident Act, one may claim compensation for funeral expenses, loss of expectation of life, loss of estate and pecuniary loss of dependants. While calculating pecuniary loss to dependants, the amount the deceased would have earned less the amount he would have spent on himself is capitalised. Thereafter a percentage is deducted in lieu of lump sum payment which would be available for immediate investment on market rates of interest then prevalent. At the same time allowance has to be made for expected inflation in future. These general principles are laid down in the leading

I,.....solemnly declare that the particulars given above are true and correct to the best of my knowledge.

Signature or thumb-impression
of the applicant.

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cases of *Gobald Motor Service* v. *R.M.K.Velu*, A 1962 SC 1; *Sheikhupura Transport Co.* v. *N.I.T. Ins. Co.*, A 1971 SC 1624; *Manjushri Raha* v. *B.L.Gupta*, (1977) 2 SCC 174; *Municipal Committee Delhi* v. *Subhagwanti*, A 1966 SC 1750; *R.D.Hattangadi* v. *Pest Control (India) Pvt. Ltd.*, A 1995 SC 755, ALR 1995 (25) 170 (SC), 1995 A SCW 243, 1995 (1) SCC 551). Decisions on what multiplier of annual savings (i.e., income of deceased minus expenditure on himself) should be adopted while capitalising it are not uniform; the age, the health of the deceased, his future prospects in life, the average longevity in his family, the return on investment one gets at current rates, and the possibility of remarriage of widow are all relevant factors (*M.P.S.R.T.C.* v. *Sudhakar*, A 1977 SC 1189, 1977 ACJ 290, (1977) 33 SCC 64; *Manjushri Raha*, supra; *C.K.S. Iyer* v. *T.K.Nair*, A 1970 SC 376; *Mallett* v. *Mc Monagle*, 1969 ACJ 312 (HL); *Sheikhupura Transport Co.* v. *N.I.T. Ins. Co.*, A 1971 SC 1624). The amount received by the dependants from other sources such as life insurance amount, *ex gratia* payments, etc. are, according to most High Courts, not deducted even though in India no amendment to that effect has been made in the Fatal Accidents Act on the lines of the one made in Britain in 1959 [*Bhagwanti Devi* v. *Ish Kumar*, 1975 ACJ 56; *Sushila Devi* v. *Ibrahim*, 1974 ACJ 150, A 1974 MP 181; *Automobiles Transport* v. *Dewalal*, A 1977 Raj 121; *L.I.C.* v. *Kashturi*, A 1973 Guj 216; *Amarjit Kaur* v. *Vanguard Ins.*, 1981 ACJ 495; *Bhagat Singh Sohan Singh* v. *Om Sharma*, 1984 Com Cas 286 (P & H-FB), dissenting from *Orissa S.R.T.C.* v. *Shibanand*, 1979 ACJ 45 (Ori); *Parvatamma* v. *Syed Ahmad*, 1977 ACJ 72 (Karn)]. Ex gratia payment made voluntarily either by tort feasor or by any body cannot be deducted from compensation fixed for complainants (*A.P. S.R.T.C.* v. *B. Krishnaji Rao*, 1994 (2) ALT 338 AP). Family pension received by dependants is, however, to be deducted. No damages are claimable on account of solatium (*Asha Rani* v. *Union of India*, 1984 Com Cas 268; *Lachhman Singh* v. *Gurmeet Kaur*, A 1979 P & H 50 (FB); *State of H.P.* v. *Dole Ram*, 1981 ACJ 219). Damages can be claimed in respect of death of wife who performed household duties (*Sunny* v. *Darshan lal*, A 1985 P & H 343) or unmarried daughters as well (*Rupinder* v. *Jaswant*, A 1985 P & H 366). Adult sons who were not dependant of deceased father cannot, however, claim damages (*Sahyogata Devi* v. *Lalit Kumar*, A 1985 P & H 349).

The determination of compensation cannot be in a strait-jacket formula. What compensation is to be awarded depends upon the nature of injuries, status of person, effect of injury on the person in future and also the mental and physical pain that the injured has sustained (*United India Insurance Co. Ltd.* v. *Brijesh Kumar Jain*, 1995 ALJ 399 (All) (DB). Normal life expectancy should be assumed as 65 years. Where no payment was made to the widow of the deceased till the hearing

No. 121—Application for Reference to Court under Land Acquisition Act *(ddd)*

Before the Collector, Varanasi

Reference application No. of 199

A.B. .....*Petitioners*

Versus

1. State of U.P., through Collector, Varanasi,
2. C.D.

Opposite Parties

Subject : Reference under section 18, Land Acquisition Act

Ref : Award No.30 dated 30.3.95 in respect of Case No.5 of 1993

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of the appeal, the deduction for lumpsum payment was held unjustified (*Urmilla Pandey* v. *Khalil Ahmed*, A 1994 SC 2405).

The owner of vehicle was driving and driver accompanied in course of hi duty. The insurer is liable to compensate a workman driver to the extent provided under the Workmen's Compensation Act. (*New India Assurance Company Ltd.* v. *Raj Kumari*, A 1995 All 1 DB, 1995 ALJ 47 All). Compensation cannot be denied on technical grounds (*Bojja Raju* v. *The United India Insurance Co.*, 1994 (2) ALT 76 (AP).

Comprehensive policy of vehicles under section 95 (2) (b) of old Act entitles the owner to claim reimbursement of the entire amount of loss or damage suffered upto the estimated value of the vehicle. It does not mean that the limit of liability with regard to third party risk becomes unlimited or higher than the statutory liability. For this purpose, a specific agreement is necessary (*New India Assurance Company Ltd* v. *Shanti Bai*, A 1995 SC 1113, JT 1995 (2) SC 95, 1995 ALR 504 (SC).

(ddd) The Collector's award is only an offer on behalf of Government and it is the right of the claimant, if dissatisfied with it, to seek adjudication by the Court. This can be done by asking the Collector to make a reference under section 18, Land Acquisition Act. Mere recording of protest at inadequacy of amount while

Sir,

1. Land detailed in notification No.____dated _____ under section 6, Land Acquisition Act published in U.P. Gazette dated was acquired after earlier publication of notification under section 4 of the Act in Gazette dated

2. Out of the said land the petitioner is owner of land (with buildings and/or trees situated thereon) indicated by *khasra* survey Nos..... (*or*, bounded as follows).

3. The Special Land Acquisition Officer has been pleased to award a sum of Rs.....to the claimant as compensation for his share of the same, and Rs.....as compensation to CD (opposite-party No. 2) for his share.

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withdrawing it is not enough unless a request for reference is made; a valid reference is the condition precedent for the court to exercise jurisdiction (*Kana Navanna* v. *R.D.O.*, A 1955 Mad 23). The Courts have not always insisted on strictly formal compliance with this provision, and often even informal communications have been accepted as references. For instance, a letter by owner of land to the Collector saying that he would not accept the amount but would contest it in court, even though not containing a formal request for reference to court, was held a sufficient reference (*Krishnammal* v. *Collector*, A 1927 Mad 282; *In re Rangaswami*, A 1964 Mad 435) so also a receipt for the amount with endorsement asking for reference of the dispute to court (*P.M.Association* v. *Collector*, A 1964 AP 264). A request for reference without specifying any grounds was held to be an implied objection to adequacy of the amount (*P.Chandrashekhara* v. *Collector*, ILR (1966) 2 Mad 428). Want of a formal prayer for reference was held not fatal in *Kelappan* v. *State of Kerala*, 1968 Ker LT (SN) 7. The court has jurisdiction to decide whether the reference was made beyond the period prescribed by the proviso to sub-section (2) of section 18 of the Act, and of it finds that it was so made, decline to answer reference (*Md. Hasnuddin* v. *State of Maharashtra*, A 1979 SC 404, (1979) 2 SCC 572 overruled AIR 1929 All 769; AIR 1963 All 556 FB; AIR 1959 All 576 FB; AIR 1943 Mad. 327 and AIR 1958 Punj 490). Thus a mere letter to the Collector disputing sufficiency of the amount but not saying anything about reference to court was held not amounting to a reference u/s 18 (*State of Kerala* v. *C.R.Viran*, A 1984 Ker 229). The application should specifically require the Collector to make a reference and contain objections which may relate to measurement of land, amount of compensation, persons to whom payable or apportionment and also the grounds of such objections. The petitioner who received compensation without making protest against the award shall not be entitiled to make reference under section 18. Protest made after accepting the compensation under an award has no consequence.

4. The petitioner objects to the award on the grounds appearing in the following paragraphs.

5. The petitioner has been wrongly taken to be a lessee of the land and CD as lessor, whereas in fact the petitioner is full owner of the land.

(*Or*, The petitioner has wrongly been shown as owner of one-third share whereas his actual share is one half. The land originally belonged to.....who died on.....leaving the petitioner and CD as heirs. The relevant pedigree is shown below :)

Pedigree

(*Or*, The petitioner has wrongly been shown as owner of land alone whereas actually he is owner of the buildings and trees as well).

6. The area of the land acquired has been wrongly shown as.....sq. metres instead of.....sq. metres.

7. The market value of the land has been wrongly shown as Rs.....per sq. metre instead of Rs.....per sq. metre. Reliance has been wrongly placed by the Special Land Acquisition Officer on sale-deeds of dates much earlier than the date of notification under section.

The onus lies on the claimant who is in the position of plaintiff to adduce necessary and relevant evidence in proof of the objection for higher compensation (*K.Posayya* v. *Special Tahsildar*, A 1995 SC 1641). The burden lies on the claimant to prove the prevailing market value as on the date of notification under section 4 (1) of the Act (*M.V.K. Gundarao* v. *Revenue Divisional Officer*, 1996 (3) SCC 129).

In reference under section 18 of the Act, the beneficiary for whose benefit the land is being acquired is a necessary party (*Victoria Xavier* v. *Greater Cochin Development Authority*, A 1993 Ker 95 (DB); *M.P.Electricity Board* v. *Rukmanibai*, A 1992 MP 50; *Nevely Lignite Corpn. Ltd.* v. *Special Tahsildar*, A 1995 SC 1004; 1995 (I) SCC 221; *Gujarat Housing Board* v. *Nagajibai*, A 1986 Guj 81 FB), the person who have occupancy rights in the land have a right to be impleaded as party to the proceedings (*Sushila Appasaheb Mangaj* v. *Assistant Commissioner*, 1995 (2) Ker LJ 545 Kant). Every person whether a government owned company or private company for whom the land is acquired is a "person interested" and notice to it is necessary (*Steel Authority of India Ltd.* v. *State of Kerala*, A 1996 Kerala 166 DB). A person who was not a party to the proceedings before the land acquisition officer, is not a necessary party before the Civil Court in reference under section 18 of the Act (*Amar Singh Yadav* v. *Shanti Devi*, A 1987 Pat 191 FB).

Simultaneous publication of notification under S. 4 (1) and declaration under section 6 of land acquisition is not illegal (*Ghaziabad Development Authority* v.

Those sale deeds relate to much larger areas of land while smaller plots fetch much more price. Those sale deeds relate to less well situated land.

8. The value of the trees which was Rs.....has been wrongly excluded.

Jan Kalyan Samiti, Sheopuri, Ghaziabad, 1996 (2) SCC 365). In the case of reference under this Act by the Collector, the reference Court cannot go behind reference and declare that notificaition under section 4 (1) and declaration under section 6 are null and void or illegal. The duty of the Court is confined vis-a vis the provisions contained under sections 11, 18 and 20 to 23 of the Act (*Balram Chandra* v. *State of U.P.*, 1995 All LJ 1161, A 1995 SC 1552, (1995) 3 SCC 723).

On principles for determining market value, see *Deepchand* v. *State of U.P.*, (1980) 3 SCC 231; *Bangaru Narasingha Rao* v. *R.D.O.*, (1980) 1 SCC 575; *Vijay Kumar* v. *Maharashtra*, (1981) 2 SCC 719; *State of Kerala* v. *Hassan Koya*, A 1968 SC 1201; *Union of India* v. *Shanti Devi*, A 1983 SC 1190, (1983) 4 SCC 542; *Saheb Singh* v. *Amritsar Imp. Trust*, A 1982 SC 940; *Krapa Rangaish* v. *Sp. Dy. Collector*, A 1982 SC 877. Where the land acquired is large tracts of land, stray sale-deeds of small pieces of land cannot form the basis for determination of compensation. For duty of reference Court, see *K Posayya* v. *Special Tahsildcr*, (1995) 2 M.C.J. (SC) 72, A 1995 SC 1641. Land Acquisition Act expressly enjoins to omit consideration of future use of land or potentialities of the neighbouring lands on account of the acquisition in determining compensation (*State of Orissa* v. *Brij Lal Misra*, 1995 (III) C.C.C. 150 (SC).

In order to establish market value of the acquired land evidence of comparable sale transactions of the land acquired or of the lands in the neighbourhood possessed of similar potentiality or advantages has to be filed. Entry of price in the mutation record is not admissible evidence. Original or copies of sale transactions constitute admissible evidence (*Major Pakhar Singh Atwal* v. *State of Punjab*, A 1995 SC 2185). The court is not to award any amount in excess of the amount claimed (*State of Punjab* v. *Raman Rai*, (1995) 5 SCC 610).

The Collector or the Court who determines compensation for the land as well as the fruit bearing trees cannot determine them separately. The compensation is the value of the acquired land. The market value is determined on the basis of the yield. Under no circumstances the Court should allow the compensation on the basis of the nature of the land as well fruit bearing trees. When market value is determined on the baiss of the yield from the trees or plantation, 8 years' multiplier is appropriate multiplier. For agricultural land 12 years' multiplier is suitable multiplier (*State of Haryana* v. *Gurcharan Singh*, JT 1995 (2) SC 345).

A sale-deed executed after the notification under Sec. 4 (1) of the Land Acquisition with intent to inflate the market value of land cannot be taken into consideration (*K. Posayya* v. *Special Tahsildar*, A 1995 SC 1641).

The landowner who did not file appeal against the judgment delivered in a reference under Sec. 18 of the Act has no right to apply for re-determination of

9. The value of the building has been wrongly shown as Rs.....instead of Rs..... First class bricks were actually used while value of third class bricks has been calculated. Depreciation has been wrongly inflated as 50% although the building was only 15 years old and

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compensation under Sec. 28A of the Act (*G.Krishna Murthy* v. *State of Orissa*, A 1995 SC 1436; *Babia Ram* v. *State of UP*, (1994) 7 JT (SC) 377, A 1995 SCW 65). An agreement for sale does not confer any title, the purchaser in possession of the land on the basis thereof is not entitled to any compensation (*Sunil Kumar Jain* v. *Kishan*, A 1995 SC 1891, 1995 (3) CCC 108, (1995) 4 SCC 147).

The liability to pay interest on the amount of compensation determined under section 23 (1) continues to subsist until it is paid to the owner or interested person or deposited into court under section 34 read with section 31. The liability to pay interest on the excess amount of compensation determined by the civil court under section 26 over and above the compensation determined by the Collector/ Land Acquisition Officer under section 11 subsists until it is deposited into court. **The computation of the interest should be calculated from the date of taking possession till date of payment or deposit** in terms of section 28, as the case may be (*Prem Nath Kapur* v. *National Fertilizer Corpn. of India*, (1996) 2 SCC 71 at 78). An opportunity of hearing to the landowner under section 5-A (2) of the Act is mandatory (*Rambhai Lakhimbhai Bhakt* v. *State of Gujarat*, A 1995 SC 1549, 1995 (3) SCC 752).

The Court has no power to impose any condition to pay interest in excess of the rate prescribed by the statute as well as for a period anterior to the publication of section 4 (1) of the Act (*Union of India* v. *Budh Singh*, 1995 (III) CCC 292 (SC). Declaration under section 6 published within one year of last date of local publication under section 4 (1) is not invalid (*Rambhai Lakhanbhai Bhakt* v. *State of Gujarat*, A 1995 SC 1549, 1995 (3) SCC 752).

The Land Acquisition Act is a self-contained Code and it does not speak of payment of any court fee. It requires only that the application should be made within the limitation prescribed either in clause (a) or (b) of sub-section (2) of Section 18 of the Act (*Kashiram Namdeo Zambaro* v. *State of Maharashtra*, 1996 (I) SCC 289). Where a Development Authority, not being a claimant prefer an appeal seeking avoidance of amount of higher compensation awarded by the reference court, the appellant was required to pay ad valorem court fee as the provisions of Art. 11 of Schedule 2 of the Court Fees Act are not applicable (*Indore Development Authority* v. *Tarak Singh*, A 1995 SC 1828).

Limitation prescribed by the proviso to section 18 for an application for reference is (a) six weeks from the date of the award if the award was made in the presence of the claimant; (b) in other cases, six weeks of the receipt of the notice from the Collector under section 12 (2). or within six months from the date of the award whichever is earlier (*State of Punjab* v. *Qaisar Jehan*, A 1963 SC 1604). The Court cannot act on an invalid or time-barred reference (*Md. Hasnuddin* v. *State of Maharashtra*, A 1979 SC 404, (1979) 2 SCC 572). On the question whether Collector can condone the

prices have appreciated during that period.

Prayer

It is prayed that a reference be made to the Court of the District Judge for adjudication of these objections and for award of Rs.....as compensation besides solatium and interest to the petitioner.

Petitioner

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delay in the application u/s 5 Limitation Act, there is conflict of judicial opinion (Yes : *Mohan Vatsa* v. *State*, A 1985 Guj 115; No : *Prabhakar* v. *P. Y. Dehspande*, A 1983 Bom 342).

PART III
WRITS

Writ of Habeas Corpus

No. 1—Habeas Corpus Petition Against Preventive Detention under National Security Act *(a)*

In the High Court of Judicature at Allahabad

Writ Petition No. _____ of 19

(Under Article 226 of the Constitution of India),

Ganga Ram son of Shanker Prasad, aged about 30 years, resident of house No. 5/30, Model Colony, Bulandshahr, through Smt. Rashmi Devi wife of Ganga Ram aforesaid, as next friend.

.....*Petitioner*

Versus

1. State of Uttar Pradesh, through Secretary, Home Department, Lucknow.

2. District Magistrate, Bulandshahr.

3. Superintendent, District Jail, Bulandshahr.

.....*Respondents*

To

The Hon'ble Chief Justice and His Companion Judges of the aforesaid Court.

The humble petition of the petitioner above named respectfully showeth :

(a) Habeas corpus petition may be filed for release from illegal custody of any person detained either by a State agency or by a private individual.

In regard to detention in official custody the officer or Government by whose order the person is detained as well as the officer incharge of the establishment where he or she is detained should be impleaded as respondents.

Normally no such petition lies in respect of detention in prison in execution of a sentence passed and conviction ordered by a criminal court even though the conviction may be against the weight of evidence on the record or may be based on a wrong interpretation of law. In such cases the remedy of appeal or revision under the Code of Criminal Procedure or other similar law should be availed. The High Court has also inherent power under section 482 Cr. P.C. to grant redress with a view to preventing abuse of process of court even where no appeal or revision lies. Likewise, the legality or correctness of a conviction and sentence by a Court Martial

1. The petitioner is a peaceful law abiding citizen engaged in employment as a mechanic in a local motor repairs workshop named Ashok Motors.

2. On September 2, 1984 the petitioner was arrested and served with an order of detention dated September 1, 1984 passed by District Magistrate, Respondent No.2 purporting to act under sub-section (2) of section 3 of the National Security Act, 1980. He has been detained in the District Jail, Bulandshahr, of which Respondent No.3 is the Superintendent, in pursuance of the said order.

3. The order of detention recited that Respondent No.2 was "satisfied" that it was necessary to pass the order in order to prevent the petitioner from acting in any manner prejudicial to the maintenance of public order. A true copy of the order is Annexure 1 to this petition.

4. The said order was accompanied by the grounds on which it was purported to have been made. A true copy of the grounds is Annexure 2 to this petition.

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under the Army Act, the Air Force Act or the Navy Act cannot be challenged through a habeas corpus petition. Article 227 and Article 136 of the Constitution lay down that the High Court or the Supreme Court cannot exercise its power of judicial superintendence under those articles over a court martial. There is, however, no such exclusion in Article 226 or in Article 32. Thus in very exceptional cases of lack of jurisdiction or of clear violation of the rules of natural justice or of unconstitutionality of the law under which the order has been made, the High Court or the Supreme Court may entertain a habeas corpus petition even against a detention in pursuance of an order of conviction passed by an ordinary criminal court or a Court Martial.

Whenever a question is raised regarding the illegal detention of a citizen in a writ of Habeas Corpus and the court issues the *rule nise*, a duty is cast on the State through its functionaries and in particular on those who are arrayed as respondents to the writ petition to satisfy the court that the detention of the citizen was legal and in conformity not only with the requirements of law but also with the requirements implicit in Article 22 (5) of the Constitution and to place before the court all relevant facts relating to the impugned detention with utmost fairness (*Dhananjay Sharma* v. *State of Haryana*, A 1995 SC 1795).

This writ is most frequently used in cases of preventive detention. Article 21 of the Constitution guarantees the fundamental right of life and liberty of a person which cannot be taken away except in accordance with law. Courts have power not to recognise a statutory provision as a constitutionally valid 'law' within the meaning of this Article if the provision is vague, unconscionably harsh, unreasonable or

5. The grounds were three in number and were in substance as follows :-

(i) That certain incident of communal rioting (*or*, incidents of violence and arson at M/s Ashok Motors, the workshop at which the petitioner was employed) had taken place on August 30 and 31, 1984, and the petitioner was, as revealed by intelligence reports received by Respondent No.2, the moving force behind these incidents.

(ii) That the petitioner is an office-bearer of the local unit of the R.S.S. (*or*, Muslim League *or*, C.P.M.)

(iii) That the petitioner had set up a defence committee for providing legal aid to Hindus/Muslims (*or*, workers arrested by the police in connection with the said incidents).

(iv) That earlier in August 1975 the petitioner was involved in crime No.180 Police Station Anoopshahr under section 324 I.P.C.

6. No copy of the intelligence reports received by the respondent No.2 was supplied to the petitioner, nor were any details furnished to the petitioner in regard to his role in the said incidents.

7. The grounds of detention were supplied to the petitioner in English, a language which the petitioner does not know or understand, and inspite of his request the grounds were not supplied to him in Hindi, nor were they explained to him in that language (*or*, the petitioner made a representation against the order to the State Government, Respondent

unfair, or violative of the principles of natural justice (*Meneka Gandhi* v. *Union of India*, A 1978 SC 597; *Supdt. and Remembrancer for Legal Affairs* v. *Satyen Bhowmic*, A 1981 SC 917).

Article 22 permits preventive detention without trial but subject to certain safeguards specified therein. The most important safeguard is the right of the detenue to be apprised of the grounds of detention and to have his representation against detention fairly and promptly considered by the Government. Accordingly, provisions, have been made in the National Security Act 1980 (N.S.A.), the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA) and Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980, clearly defining the grounds on which detention can be ordered, the authorities by which it can be ordered and requiring the furnishing to the detenue of the grounds of detention and allowing him the right to represent to the Government concerned against it and also providing for obtaining the opinion of an Advisory Board consisting of judicial experts before continuing

No.1 on Sept. 5, 1984 but the same has been rejected by the Home Secretary on behalf of Respondent No.1 on October 15, 1984. True copies of the representation and the order of rejection are respectively Annexures 3 and 4 to this petition).

8. The State Government has not delegated the power of detention under sub-section (3) of section 3 to Respondent No.2.

9. The Home Secretary had not been given any power by the Rules of Business made under Article 166 of the Constitution or Standing Orders made thereunder to pass final orders on behalf of the State Government on representations made under the Act.

10. As regards crime No.180 of 1975 the fact is that though a false F.I.R. involving petitioner was lodged by one Shiv Dayal, the same had

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the detention. The power to pass an order of preventive detention is exercisable on the subjective satisfaction of the competent authority that it is necessary to detain that person in order to prevent him from acting in future in the manner he acted in the past as disclosed in the specified grounds. It may, therefore, be based on suspicion even without legally sufficient evidence being available in support of those grounds. In a petition challenging the detention it cannot, therefore, be successfully urged that the detaining authority acted merely on suspicion or without legal evidence or that the material placed before the authority was insufficient for its satisfaction (*Monilal Roy Chowdhry* v. *W.B.*, (1976) 1 SCC 191).

Sometimes in the case of dreaded criminals the prosecution has in the past been or is likely in future to be unsuccessful because the witnesses were or are too afraid to depose against the offender or because of fear they deliberately identified a person different from the true offender at a test identification parade. In such cases the detaining authority can validly take the facts of those cases into consideration for arriving at its subjective satisfaction even though the detenue may have been earlier acquitted in respect of those charges or may not have been prosecuted at all (*Mohd. Subrati* v. *W. Bengal*, (1973) 3 SCC 250; *Golam Husain* v. *Commissioner of Police*, (1974) 4 SCC 530; *K.M. Choksi* v. *Gujarat*, (1979) 4 SCC 14). The representation of a detenu has to be disposed of with reasonable expedition, and delay in disposal of the representation violates Art. 22 (5) of the Constitution (*Kamlesh Kumar Ishwardas Patel* v. *Union of India*, (1995) 4 SCC 51, 1995 (3) SCC 639; *Rajesh Kumar* v. *State of Rajasthan*, 1996 Cr LJ 817 (Raj) DB); *Sivapackyam* v. *Govt. of Kerala*, 1996 Cr LJ 840 (Ker) DB). Once a representation was made the detenu was entitled to representation being dealt with expeditiously and if there was some ex facie delay, the obligation was on the State to explain that delay. After appreciation of the materials it was found that there had been unexplained delay in the disposal of the representation of the detenu and the Central Government failed in its duty and consequently, the order of the detention was quashed (*Rajindra* v.

been found on investigation to be false and final report had been submitted by the police and the Magistrate had accepted it on 5th October 1975.

11. The petitioner's wife is interested in the liberty of the petitioner as his next friend.

12. The petitioner submits that the detention of the petitioner is illegal on the following—

Commissioner of Police, Nagpur Division, 1994 SCC (Cr.) 1706). It is not open to the High Court or the Supreme Court to substitute its own satisfaction for that of detaining authority or to review the material for that purpose or to adjudicate on the factual correctness of the grounds (*Monilal Roy Chowdhry* v. *West Bengal*, (1976) 1 SCC 191), provided the order is passed by the competent authority, i.e., the authority empowered in this behalf by the statute or by a valid order of delegation (*Ajaib Singh* v. *Punjab*, A 1965 SC 1619).

However, as preventive detention without trial is accepted only as a necessary evil and is not looked upon with favour the courts usually interpret the provisions of such laws very strictly and also insist on the giving to the detenue an opportunity of making a representation not merely as a formality but as a real and substantial opportunity, the same being his fundamental right. This right is deemed denied or defeated if the detenue is furnished the grounds of detention in a language with which he is unfamiliar (*Razia* v. *Union Of India*, (1981) 1 SCJ 113; *Feroz Ahmad Shah* v. *State*, 1996 Cr LJ 897 (J & K); *Surjeet Singh* v. *Union of India*, A 1981 SC 1153) or when the grounds are not accompained by all the materials referred to therein which were taken into consideration by the detaining authority for arriving at its subjective satisfaction (*Kirtikumar C. Kundaliya* v. *Gujarat*, A 1981 SC 1621) or where there is delay in supplying the documents relied on (*Virendra Singh* v. *Maharashtra*, (1981) 4 SCC 562; *Hansmukh* v. *Gujarat*, (1981) 2 SCC 175), or when there is failure to consider or unexplained and undue delay in disposing of the detenue's representation against the order (*Ashok Kumar* v. *Jammu & Kashmir*, A 1981 SC 851; *Kamlesh Kumar Ishwar Das Patel* v. *Union of India*, (1995) 4 SCC 51; *Pabitra N. Rama* v. *Union of India*, (1980) 2 SCC 338). Delay of 84 days on part of Jailor in despatching representation to Central Government violated detenu's constitutional right under Article 22 (5) of the Constitution (*B. Alameln* v. *State of Tamil Nadu*, 1994 (3) Crimes 828 (SC), 1995 SCC (Cr)224).

Where the detenu is an illiterate person, non-explanation of grounds of detention to him amounts to non-communication and the order of detention is liable to be set aside (*Feroz Ahmad Shah* v. *State*, 1996 CLJ 897 (J & K). Where there were contradictions in English and Hindi version of the detention order, the detenu was deprived of a fair opportunity of making effective representation, hence the detention order was quashed (*Dilip Kumar Jain* v. *Union of India*, 1996 Cr LJ 547 (Raj) DB).

Although the court cannot go into sufficiency of the grounds for the

Grounds

(a) Because Respondent No.1 had not delegated the power of detention to Respondent No.2 and as such the order of detention was incompetent.

(b) Because the detaining authority in breach of Article 22 (5) of the Constitution and section 8 of the Act has denied to the petitioner an opportunity of making an effective representation against the order of detention inasmuch as :—

satisfaction of the authority, the satisfaction will be held to be invalid if it is *mala fide* (for fraud or bad faith invalidates all official action) or based on vague grounds or grounds extraneous to the requirements of the statute in question (*Dr. Subhawant Rai Jain* v. *Uttar Pradesh*, 1982 Cr LJ 725, All; *Shiv Prasad* v. *Madhya Pradesh*, (1981) 3 SCR 81) or if it has been mechanically recited in the order without application of mind (*Kishori Mohan* v *W.B.*, (1972) 3 SCC 845). The courts are so strict in this ragard that even if the order specifies that some activity of the person proposed to be detained was subversive of "law and order" the same cannot be upheld under the head "public order" mentioned in National Security Act, though there is only a difference of degree between the two (*Shiv Pd.* v. *Madhya Pradesh*, A 1981 SC 870; *Parimal* v. *W.B.*, (1972) 2 SCC 520). Further, the grounds should not be stale, for it would be unreasonable to base an apprehension about how a person is likely to behave in future merely on the basis of his conduct in the remote past (*Lakshman* v. *West Bengal* (1974) 4 SCC 1; *Bhut Nath Mete* v. *W.B.*, (1974) 1 SCC 645; *Ajay Dixit* v. *State of U.P.*, A 1985 SC 18). A single incident of crime committed by a person may not be indicative of his criminal propensity unless the incident is one which shows a design, system or planning (*Anil Dev* v. *West Bengal*, (1979) 4 SCC 514; *Saraswati Sheshagiri* v. *Kerala*, A 1982 SC 1165; *Nandlal Roy* v. *West Bengal*, (1972) 2 SCC 524; *Surya Prakash Sharma* v. *State of U.P*, 1994 SCC (Cri.) 1691). A solitary crime directed against a single individual on account of personal enmity and not likely to generate general panic or insecurity or a riot may not be accepted as adversely affecting 'public order'. The test is whether the acts perpetrated are of such a nature or of such potentiality as to travel beyond the immediate victims and affect the general or local public (*Parimal* v. *W.B.*,(1972) 2 SCC 520; *Golam Husain* v. *Commissioner Police*, (1974) 4 SCC 530; *Nandlal* v. *W.B.*, (1972) 2 SCC 524).

If several grounds of detention are metioned in the order of detention or in the memorandum accompaying that order then every ground must be germane and valid, for it is presumed that the subjective satisfaction of the detaining authority is based on a consideration of all the grounds collectively and it is not open to the Court to speculate whether the detaining authority would have felt satisfied or not that the detention of the person concerned was expedient on only one or more of those grounds alone. Thus even if one of the grounds stated suffers from any such infirmity as aforesaid, the whole order will fall and the court will not say that the

(i) the first ground of detention mentioned in paragraph 5 was vague as it did not disclose in what manner the petitioner was the "moving force behind the incidents".

(ii) the intelligence reports on which the "satisfaction" of the District Magistrate was founded were not supplied to the petitioner.

(iii) the grounds were neither furnished nor explained to the petitioner in the language understood by him.

(c) Because the second ground of detention was not a valid ground in as much as the petitioner has a fundamental right to be a member of any social/political organisation of his choice.

(d) Because Membership of the R.S.S. (*or*, Muslim League *or* C.P.M.) is not prohibited by or under any law, hence this fact was not relevant for the purposes of the Act.

(e) Because the third ground of detention was also illegal and irrelevant in as much as petitioner has a fundamental right to form and take part in a

detention order could be supported on the surviving grounds (*Bimla Dewan* v. *Lt. Governor*, A 1982 SC 1257). However, COFEPOSA contains a specific provision in section 5 A to the effect that an order of detention passed on several grounds will be deemed to be based on each of those grounds severally; hence the above principle does not apply to COFEPOSA (*State of Gujarat* v. *Chamanlal M. Soni*, A 1981 SC 1480, (1981) 2 SCC 24). Recently in the wake of the activities of extremists in Punjab a similar provision has been inserted in the N.S.A in 1984 vide section 5 A.

Circumstance in which persons may be detained for periods longer than three months without obtaining the opinion of the Advisory Boards-see section 14 A added by Amending Act 27 of 1987.

Another case in which detention by a State authority may be challenged is where, pending criminal investigation, an accused is detained in police lock-up or in prison without a proper remand order from a magistrate under section 167 Cr.P.C. (*Mantoo Majumdar* v. *State of Bihar*, (1980) 2 SCC 406). In such cases the existence of a valid remand order on the date of the return filed to the habeas corpus petition is accepted as sufficient, even if there was any illegality in respect of detention during an earlier period in the same continuation (*Kanhaiya* v. *State* (1979) 2 All 134, 1979 AWC 548; *Surjeet Singh* v. *State*, 1984 ALJ 375 FB; *Radhey Shyam* v. *State*, 1995 CLJ 556; 1994 ACC 645 (All); Lokendra Singh v. State of U.P., 1996 A LJ 67 (All); Manish Kumar v. Union of India, 1996 CrLJ 442 (All).

This writ is also sought where a person is detained in some governmental institution other than prison, such as a beggars home, an orphanage, a women's protection home (see, e.g. *Kalyani Chaudhri* v. *State of U.P.*, (1978) 2 Cr LJ 1003: *Neelam* v. *Chhedial*, 1986 All CJ 86); or a lunatic asylum run by a State agency. In

committee formed for the constitutionally legal purpose of rendering legal aid to persons accused of any offence and the rendering of such aid is not prohibited by or under any law.

(f) Because the fourth ground of detention namely, the petitioner's alleged involvement in crime No.180 of 1975 could not have been taken into consideration without the fact of final report having been submitted and accepted being also considered, and at any rate because it was a stale matter and moreover it pertained to a minor quarrel between two individuals which could not affect the community at large and the "satisfaction" of Respondent No.2 was vitiated on that account.

(g) Because none of the second, third and fourth grounds has any bearing on the maintenance of public order, and as such the taking into consideration of these grounds for the Respondent No.2's satisfaction vitiates the entire order of detention, for it cannot be said whether or not he would have been satisfied of the need to detain the petitioner on the first ground alone.

(h) Because the disposal of the petitioner's representation by the Home Secretary was incompetent and in effect the representation was not considered by the State Government at all, and this resulted in breach of the petitioner's constitutional right under Article 22 (5).

(i) Because in the absence of a valid order of detention the petitioner's detention is violative of his fundamental right of liberty granted by Article 21 of the Constitution.

(j) Because at any rate the State Government took an unreasonably long time in consideration and disposing of the representation of the petitioner, and this delay amounted to breach of his constitutional right under Article 22 (5).

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all such cases the keeper of the institution is required to produce a valid order of a competent authority under some law authorising him to keep the person under detention or under his custody and care. Minor procedural irregularities in the order of remand may, however, be ignored by the court (*Uma Kant*, v. *State of U.P.*, 1982 Cr LJ 1836). Where the plea that there was delay in the order of detention and its execution was not raised in the original petition, in the absence of the pleading the detenu was not allowed to raise the same in arguments (T.P. Abdul Majeed v. Union of India, 1996 Cr LJ 781 Ker DB).

While applying the principle of *res judicata* to a habeas corpus proceeding

Prayer : Writ of habeas corpus be issued against the respondents for production of the petitioner in this Hon'ble Court and for his being set at liberty forthwith (*or*, after quashing the order of detention Annexure 1).

(Smt. Rashmi Devi)
Next friend of Petitioner
Through

Dated Nov. 5, 1984 Advocate.

Affidavit in support of writ petition

Affidavit of Smt. Rashmi Devi wife of Ganga Ram, aged about 25 years, resident of house No.5/30, Model Colony, Bulandshahr.

The abovenamed deponent makes oath (*or*, solemnly affirms) and says as under—

1. The deponent is the wife and next friend of the petitioner Ganga Ram and is acquainted with the facts of the case.

2. The facts mentioned in paragraphs 1,2, and 11 of the accompanying writ petition are true to the personal knowledge of the deponent, the facts mentioned in paragraphs 3 to 7 thereof are based on perusal of records and the facts mentioned in paragraphs 8,9 ad 10 thereof are based on information received and believed to be true.

3. The contents of paragraphs 1 and 2 of this affidavit are true to my personal knowledge, and nothing has been concealed therein.

Rashmi Devi,
Deponent

No. 2— Application for Interim Relief, along with Habeas Corpus Petition

May it please your Lordships

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the court will look at the previous decision only in regard to pleas actually raised and decided; the principle of constructive res judicata does not apply (*Lallubhai J. patel* v. *Union of India*, A 1981 SC 728).

A habeas corpus petition may be filed either by the detenue or by someone on his or her behalf as a next friend. If the woman detained in a rescue home is of the age of consent and *sui juris*, the Court has no option but to respect her wishes (*Gian Devi* v. *Superintendent Nari Niketan*, (1976) 3 SCC 234).

For reasons given in the affidavit accompanying the writ petition the petitioner's preventive detention is patently unlawful and as such he is entitled to be set at liberty forthwith.

It is, accordingly prayed that pending hearing and decision of the writ petition the petitioner be released on interim bail.

Petitioner

No. 3— Habeas Corpus Petition Against Preventive Detention under COFEPOSA Act

Paras 1 and 2 as in precedent No.1, substituting section 3 (1) of Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 for section 3 (2) of National Security Act and Secretary concerned to the State Government for District Magistrate.

Para 3 as in para 3, *ibid* substituting the words " acting ..... public order" by the words "acting in any manner prejudicial to the conservation or augmentation of foreign exchange" [*or*, smuggling goods; *or*, abetting the smuggling of goods; *or*, engaging in transporting or concealing or keeping smuggled goods; *or*, harbouring persons engaged in smuggling goods; *or*, in abetting the smuggling of goods] (*the exact words used in the detention order may be quoted*).

Other paragraphs and grounds of petition to be suitably adapted from precedent No.1 in the light of the grounds of detention furnished and the ingredients of section 3 (1) read with the definitions of "smuggling" etc., given in section 2 (e) of the Act and section 2 (39) of the Customs Act and section 23 of the Foreign Exchange Regulation Act. Broad lines on which the validity of detention can be challenged have already been indicated in the said precedent and in the notes below it.

Complaints of ill-treatment in prison or of denial of legal rights of prisoner are also often entertained in habeas corpus petitions (*Francis Coralie Mullin* v. *Delhi Administration*, A 1981 SC 746; *Sushil Batra* v. *Delhi Administration*, (1978) 4 SCC 494; *Hussainara Khatoon* v. *Stae of Bihar*, A 1981 SC 1068).

Having regard to the great importance that Courts attach to personal life and liberty, even informal communications, such as a letter or post card, from the prisoner in prison to the Court are accepted as habeas corpus petitions. However, if the petition is filed through a pleader, it is expected to be drafted in proper form and accompanied by affidavit, like other writ petitions.

The remedy of Habeas Corpus can be resorted to also where a person is

No. 4— Habeas Corpus Petition Against Preventive Detention under the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act

Paras 1, 2 as in precedent No.1, substituting section 3 (1) of the Prevention of Blackmarketing and Maintenance of Supplies of Essential Commodities Act, 1980.

Para 3 as in para 3, *ibid* substituting the words "supplies of commodities essential to the community" for the words "public order" (*the exact words used in the detention order may be quoted*).

For other paragraphs and grounds of petition, precedent No.1 to be suitably adapted in the light of the grounds of detention furnished and the ingredients of section 3 (1) read with the Explanation to that sub-section and the relevant provisions of the Essential Commodities Act. Broad lines on which an order of preventive detention can be successfully challenged have already been indicated in the said precedent and the notes below it.

No. 5— Habeas Corpus Petition Against Imprisonment Pending Criminal Investigation

1. *As in para 1 of precedent No.1.*

2. On September, 15, 1995 the petitioner was arrested by a Sub-Inspector attached to Police Station Kotwali of District Faizabad.

3. On Sept. 16, 1995 the police produced the petitioner before the Judicial Magistrate Faizabad without any relevant papers such as copy of F.I.R., case diary or any entries in the general diary.

4. The said Magistrate without applying his mind to the matter and without questioning the police about the relevant materials mechanically passed an order remanding the petitioner to police custody for a period of seven days.

5. On September 23, 1995 the petitioner was again produced before the said Magistrate by the police and this time also the case diary

detained by another private individual against the wishes of the former. For instance, if a girl having attained the age of consent is not allowed by her parents to marry a man of her choice, or having married such man against her parents' or other relatives' wishes is subsequently detained by the latter and not allowed by them to accompany and live with her husbnad, man that may file a petition as the girl's next

was not produced and yet the Magistrate mechanically and without applying his mind passed an order remanding the petitioner to judicial custody for a period up to October 8, 1995.

6. The petitioner has thereafter not been produced at all before any Magistrate although the last period of remand has expired long since.

7-8 *As in para 11-12 of precedent No.1.*

Grounds

(a) Because the remand orders passed by the magistrate on September 16 and September 23, 1995 were not valid in accordance with the provisions of section 167 of the Code of Criminal Procedure.

(b) Because the continued detention of the petitioner in prison after the expiry of the last order of remand dated September 23, 1995 is otherwise than in accordance with law.

(c) Because the detention of the petitioner in prison is violative of the petitioner's fundamental rights of liberty guaranteed by Article 21 of the Constitution.

Prayer—*As in precedent No.1.*

No. 6— Habeas Corpus Petition Against Detention in Beggars' Home, Women's Protection Home, Lunatic Asylum, etc.

1. *As in para 1 of precedent No.1.*

2. On Sept 10, 1995 the petitioner had set out on a journey from Jaipur to Delhi by train on his private business.

3. On reaching Delhi railway station the petitioner found to his horror that his pocket had been picked by someone and he was thereby deprived of his journey ticket and cash.

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friend. In that case the court may require the parents or other relative to produce the girl and ascertain her genuine wihses and pass suitable orders. A minor girl's wishes are not conclusive and the court must have regard to the interest of the girl. Likewise, in cases of custody disputes between rival claimants to guardianship, the court may reject the claim of a legal guardian if the best interest of the minor dictates that its custody should remain with a different person. Again cases of illtreatment of brides by their husbands or in-laws in connection with demands of dowry are regretably becoming frequent, and in those cases the brides'

4. The ticket examiner at the railway station disbelieved the petitioner's story and handed him over to a so-called "Anti Begging Squad" wrongly and recklessly treating him to be a beggar wilfully travelling without ticket.

5. The said Squad lodged the petitioner in the Beggars' Home at Shakur Basti and from there for want of accommodation he was shifted to the Beggars' Home at Faizabad in Uttar Pradesh.

6. No order for the petitioner's detention in the Beggars' Home either at Delhi or at Faizabad was passed by any magistrate or other competent authority under any law nor was any order passed by any competent authority under any law for the petitioner's transfer from Delhi to Faizabad Beggars' Home.

7. At any rate, no such order was communicated to the petitioner, nor was the petitioner informed of any such order.

8. The petitioner managed to send information about his detention at Faizabad Beggars' Home through a post card borrowed from a sympathetic person to his father living at Jaipur. The petitioner's father is familiar with the handwriting of the petitioner and recognises it on the said post card, a true photostat copy of which is Annexure 1 to this petition.

9. The petitioner's father is interested in the liberty of the petitioner and is filing this petition as his next friend.

10. The petitioner submits that the detention of the petitioner in the Beggar's Home is illegal on the following :—

Grounds

Because the petitioner has been deprived of his liberty otherwise than in accordance with law in violation of his fundamental right guaranteed by Article 21 of the Constitution.

Prayer—*As in precedent No.1.*

[With suitable adaptations, this precedent can be used for drafting a habeas corpus petition in the event of an illegal detention

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parents, brothers or other relatives or even a genuine social reforms organisation may also resort to this remedy against the offending husband and in-laws.

In the recently awakened conscience against the system of bonded labour such petitions filed by civil liberties organisations or social workers against

of a woman in a rescue home, for victims of offences of abduction, kidnapping, or offences under the Suppression of Immoral Traffic Act, or of a sane person in a lunatic asylum, and so forth].

No. 7— Habeas Corpus Petition in Respect of Detention by Private Individual

1. The petitioner is a woman of 23 years of age and is a graduate.

2. The petitioner belonged to the Christian community but she married Sri Dilip Kumar, a Hindu youth, who was employed in the same establishment as the petitioner and with whom she was and is in love.

3. Their marriage was duly solemnised in accordance with Hindu rites in the Arya Samaj at Chandigarh on August 10, 1995 after the petitioner was admitted to the Hindu faith by voluntary conversion.

4. The relatives of the petitioner were not happy with her conversion and marriage and they absented themselves from the marriage ceremony.

5. On September 5, 1995 when the petitioner had gone out alone for shopping, her brother David persuaded the petitioner to accompany him to her parents' house for a family re-union.

6. The petitioner has since been detained by the Respondent No.1 (the petitioner's father), No.2 (the petitioner's mother) and No.3 (the petitioner's brother aforesaid) at their house against her will and she is being subjected to threats and pressure and is being coerced to disown her conversion and marriage.

7. The petitioner has somehow managed to send a letter to her husband in her own handwriting (which the petitioner's husband is familiar with and recognises) mentioning her plight and asking him to take steps for her rescue. A true photostat copy of that letter is Annexure 1 to petition.

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employers alleged to be guilty of keeping their labourers in bondage are also being entertained (*Peoples Union for Democratic Rights* v. *Union of India*, A 1982 SC 1473).

Disputes about custody of children between estranged spouses may also be entertained through habeas corpus petitions (*Gohar Begum* v. *Suggi*, A 1960 SC 93; *Rajeev* v. *Pushpa Devi*, 1984 ALJ 358; *Isabell Singh* v. *Ram Singh*, A 1985 Raj 30) though in case of facts being disputed and requiring evidence otherwise than

8. The petitioner's husband aforesaid is interested in the liberty and safety of the petitioner and accordingly files this petition as her next friend. He approached the local police authorities (Respondents Nos.4 and 5) but they expressed their inability to do anything in the matter.

9. The petitioner has a right to her liberty and to live with her husband according to her choice and Respondents Nos.1 to 3 have no right to detain her against her will. She has also a right to the assistance of the police authorities, namely, Respondent No.4 (the Senior Superintendent of Police) and No.5 (the Station Officer Incharge Police Station Kotwali within whose jurisdiction the place of the petitioner's confinement is situate) for her protection.

10. The petitioner accordingly submits this petition on the following:-

Grounds

(a) The petitioner is a major and is entitled to live with her husband. Her parents and brother have no right to force her to act against her will or to detain her.

(b) The police authorities are bound by law to act in such manner as to bring the petitioner's wrongful confinement (which is a cognizable offence) to an end.

Prayer

Writ of habeas corpus be issued against Respondent No.1 to 3 for production of the petitioner in this Hon'ble Court and for her being set at liberty forthwith;

Pending decision of the petition, direction be issued to Respondents Nos.4 and 5 to take measures for ensuring the personal safety and protection of the petitioner and for ensuring her production in this Hon'ble Court by Respondent No.1 to 3.

Petitioner's next friend

[This precedent can be adapted according to the facts of the matter in other situation, such as case of—

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on affidavit, the Court would normally require the petitioner to seek his or her remedy under the Guardians and Wards Act (*M. Basuvalingam* v. *M. Swarajyalakshmi*, A 1957 AP 704; *Gopalji* v. *M. Sheo Chand* A 1955 A 28).

(i) Petition by bride's parents, brother, etc., in case they receive information that her in-laws are torturing her on account of their dissatisfaction with the sufficiency of the dowry given on her marriage;

(ii) Petition by a child's father or mother against the other parent where there has been estrangement between the parents and the petitioner claims a preferential right to the custody of the child as against the Respondent spouse who has managed to secure the child's actual custody;

(iii) Petition to secure the release of a bonded labourer from detention by his employer].

No. 8— Petition for Writ of *Quo Warranto* *(b)*

1. The petitioner is a ratepayer in the city of Quillon.

2. Under the Kerala Municipal Corporation Act ("the Act") the Chairman of Municipal Corporation is nominated by the State Government.

3. Section 5 of the Act lays down the disqualifications for nomination as and for holding the office of Chairman, and one of them is that the person who may be nominated must not have been convicted of an offence involving moral turpitude within seven years immediately preceding his nomination. A true extract of the said section is Annexure 1 to the petition.

4. On July 10, 1995 the State Government Respondent No.2 by notification No. ____ dated July 10, 1995 published in the State Gazette nominated Sri ____ Respondent No.1 as Chairman of the Quillon Municipal Corporation. A true copy of the notification is Annexure 2 to the petition.

5. Respondent No. 1 was on March 15, 1989 convicted under section 409 I.P.C. of the offence of criminal breach of trust by agent in

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(b) Through *a writ of Quo Warranto* any holder of a public office may be required to show his title to the office. This writ has been resorted to in India even against holders of offices of the Prime Minister (*M.M. Verma* v. *Charan Singh*, 84 CWN 143, A 1980 SC 95), the Chief Justice of India (*P.L. Lakhanpal* v. *A.N. Ray*, A 1975 Del 66), a Governor (*Suryanarain Chowdhry* v. *Union of India*, A 1982 Raj 1), a High Court Judge (*Union of India* v. *Gopal Chandra Misra*, A 1978 SC 694) an Advocate General (*G.L. Karkare* v. *T.L. Shevde*, A 1952 Nag 330), a Lokayukta (*Ram*

Session Trial No.15 of 1988 by the Court of Sessions Judge, Trivandrum. His appeal (Criminal Appeal No.502 of 1989) against the conviction was dismissed by the Hon'ble High Court on Oct. 12, 1989, and only the sentence passed against him was reduced from five years to two years rigorous imprisonment. His Special Leave Petition to the Hon'ble Supreme Court was dismissed summarily on January 13, 1990. The remainder of his sentence of imprisonment was however remitted by the State Government in July 1990. True copies of the said orders are Annexures 3 to 6 respectively to the petition.

6. Respondent No.1 was thus disqualified from being nominated as and for holding the office of Chairman as the offence of criminal breach of trust involves moral turpitude.

7. The petitioner is interested in probity in public life of the city and is as such aggrieved by the nomination of a corrupt person on this highly responsible post of Chairman of the Municipal Corporation. He files this petition on the following :

Grounds

(a) Because the offence of criminal breach of trust involves moral turpitude.

(b) Because the nomination of Respondent No.1 by Respondent No.2 as Chairman of the Quillon Municipal Corporation was clearly in violation of section 5 of the Act.

Nagina Singh v. *S.V. Soni*, A 1976 Pat 36), a Chairman of a State Housing Board (*Dineshwar Pd.* v. *State*, A 1980 Pat 54) besides holders of other public offices. Resort is made to this writ when the holder of the office is alleged to lack an essential statutory qualification for the office or to suffer from a statutory disqualification or when the order of his appointment or nomination suffers from any other legal infirmity. The character of office in question being a public office is absolutely necessary for the applicability of this writ. (For characteristics of a public office, see *V.C. Shukla* v. *Delhi Administration*, A 1980 SC 1382). A seat in the Legislature does not appear to be a public office (*P.L. Sharma* v. *State*, A 1979 Raj 18; *R.S. Nayak* v. *A.R. Antulay*, (1984) 2 SCC 183), hence even if a member of Legislature is alleged to suffer from any disqualification the proper remedy seems to be not a writ of *Quo Warranto* but an election petition in the case of pre-existing qualification or a petition under Article 103 or Article 192 of the Constitution in case of a supervening disqualification.

(c) Because the Respondent No.1 is disqualified from holding the said office and is accordingly not entitled to hold it and he is thus a usurper.

Prayer

(a) Writ of Quo Warranto be issued against Respondent No.1 requiring him to show his title to hold the office of Chairman of the Quillon Municipal Corporation.

(b) Notification No._____ dated July 10, 1995 a copy of which is Annexure 2 issued by Respondent No.2 be quashed.

(c) The said office be declared vacant.

No. 9— Petition for Writ of Certiorari in respect of Judicial Proceedings *(c)*

1. The petitioner is the landlord of house No. 345, Arjun Nagar, Gorakhpur, and Respondent No. 3 was its tenant for residential purposes.

2. The petitioner was employed in the U.P. Civil Service (Executive) and was posted at various places in the State during his service and was given official quarters at the place of posting.

This writ is sometimes resorted to where there is a dispute between two rival claimants to appointment or promotion to a civil post or a post in a University or other like post (*D.P. Pathak* v. *Punjab*, 1980 Lab IC 676, 1980 Serv LJ 305, (1980) 1 Serv LR 845; *Mahesh Chandra Gupta* v. *General Manager*, M.P.S.R.T.C., (1979) 3 Serv LR 545; *B.B. Singh* v. *Chairman, Legislative Council*, 1980 Lab IC NOC 97, All). The direct interest of the petitioner is not strictly insisted on in respect of the Writ of *Quo Warranto* (*P.L. Sharma*, supra), but the Court may neverthless decline to entertain the petition of a mere busybody who is in no way affected by the appointment (*Krishna Kant Jaiswal* v. *Vice Chancellor, B.H. University*, A 1984 All 350). Moreover, a futile writ of *Quo Warranto* will not be issued (*P.L. Lakhanpal*, supra; *M.M. Verma*, supra).

This writ is sometimes resorted to with a view to challenging the validity of an official act performed by the holder of the office; in such cases while a collateral challenge is not permitted, a direct challenge may be entertained (*State of Haryana* v. *Haryana Co-operative Trading Co.*, (1977) 1 SCC 271, A 1977 SC 237). A writ of *quo warranto* challenging appointment to the post on ground of want of qualifications after long period cannot be entertained (*M.S. Mudhol* v. *S.D. Halegkar*, (1993) 3 SCC 591, (1993) 4 SLR 364).

(c) A writ of *Certiorari* can be sought against an order or decision of an inferior court or tribunal or other authority (including Government) which is obliged to act judicially before passing an order or taking a decision of that nature. Thus it

3. The petitioner was last posted at Aligarh as Additional District Magistrate (City) and was residing with his family in an official residence in Civil Lines, Aligarh.

4. The petitioner was due to retire from service on attaining the age of superannuation on 30th April 1992 and was expected thereupon to vacate his official residence.

5. The petitioner gave notice to Respondent No.3 well in time about his need to occupy his house under the latter's tenancy as the petitioner on his retirement intended to settle down in Gorakhpur and did not own or possess any other house except the one under the tenancy of Respondent No.3.

6. The petitioner on 1st December 1991 filed an application under section 21 (1) (A) of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act ("the Act") for eviction of Respondent No.3 from the said building and for its release in favour of the petitioner before the Prescribed Authority (Civil Judge, Gorakhpur) Respondent No.1. This was registered as Rent Control Case No.258 of 1991. A true copy of the application is Annexure 1 to the petition.

7. Respondent No.3 contested the application by filing a Written Statement, a true copy of which is Annexure 2 to the petition. A perusal of the same would show that the facts mentioned in paras 1 to 5 above were not disputed by Respondent No.3 who merely took some legal pleas hereinafter appearing.

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is not necessary for the maintainability of a petition for this writ that the body which passed the order should be a regularly constituted court or that it should have the usual trapping of a court or tribunal. An executive authority in respect of policy decision or acts of purely administrative nature, will not be amenable to this writ, but if its order or decision, not being a policy decision but one required to be objective on the facts of a case, is likely to affect the rights of any person or have civil consequences for him then, normally, even an executive authority is expected to act judicially (e.g. an order of cancellation of a licence, vide *City Corner* v. *P.A. to Collector*, A 1976 SC 143) or at any rate fairly, i.e., in accordance with the basic principles of natural justice viz., absence of bias and *audi alteram partem* (hear the other side) *A.K. Kraipak* v. *Union of India*, A 1970 SC 150). However, even if the order or decision is going to have civil consequences for any person it does not necessarily follow that the person be given an opportunity of hearing; for the applicability of the rules of natural justice is ordinarily subject to provision to the

8. The petitioner has since retired from service and has vacated his official residence in Aligarh as he was required under Government Orders governing allotment of official accommodation, and as he and his family had nowhere else to go was invited by his-in-laws in Varanasi to live with them until he was able to make any other arrangement. The petitioner had no choice but to accept that invitation and has since June 1992 been reluctantly living with his in-laws in Varanasi but finds it humiliating and embarrassing to depend on the hospitality and generosity of his in-laws.

9. After exchange of affidavits between the parties and hearing Respondent No.1 on 13th March 1993 dismissed the petition upholding the following pleas of Respondent No.3 namely—

(a) The petitioner could build another house for himself with the aid of his provident fund and gratuity received by him on his retirement.

(b) The petitioner had been comfortably living with his in-law in Varanasi and could continue to live there as his in-laws had not required him to vacate the two rooms of their house which had been given by them to the petitioner without rent.

(c) The application under section 21 was not maintainable as it was premature having been filed even before the petitioner's retirement.

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contrary in any "law" (which includes any statutory rule or regulation by whatsoever name called). For instance, if a non-penal order is passed terminating the services of a temporary government servant or probationer or reverting an employee from a higher post held by him in an officiating capacity to his substantive post or rank, or retiring an employee after a reasonable length of service though a few years before the normal age of superannuation, the employee has no right to be heard before the order is passed (*Union of India* v. *J.N. Sinha*, A 1971 SC 40; *Champaklal C. Shah* v. *Union of India*, A 1964 SC 1854); in respect of exercise of powers under a contract also the other contracting party has no general right to hearing (*Jai Narain Singh* v. *Bihar*, A 1980 Pat 24); surveillance of a habitual offender may be started without any opportunity to him, for the furnishing of such opportunity would defeat the very purpose of secret surviellance (*Malak Singh* v. *Punjab*, A 1981 SC 760). In numerous other situations also, due to practical difficulties the need for urgency etc., the rules of natural justice may be excluded. However, even in such cases the requirement of good faith, i.e., absence of malice in fact or malice in law, is insisted on (*Manager, Govt. Branch Press* v. *Belliappa*, (1979) 1 SCC 477; *S. Venkataraman* v. *Union of India*, (1979) 2 SCC 491) as is obligatory in respect of even acts and orders of an executive nature (*A.K. Kraipak* v. *Union of India*, A 1970 SC 150, a case of selection for promotion).

A true copy of the judgment of Respondent No.1 is Annexure 3 to the petition.

10. The petitioner appealed against the said judgment to the Court of District Judge, Gorakhpur. The appeal was registered as R.C.A. No.55 of 1993 and was transferred by the District Judge to the Court of III Additional District Judge Respondent No.2.

11. Respondent No.2 on November 15, 1995 dismissed the appeal without hearing the full arguments of the petitioner's Counsel cutting him short within a couple of minutes of the commencement of his arguments, and affirmed the aforesaid findings of the Prescribed Authority Respondent No.1 and further added that it was unreasonable and contrary to the concept of social and economic justice enshrined in the Preamble to the Constitution that a well-to-do landlord should be allowed to eject a less affluent tenant. A true copy of the judgment of Respondent No.2 is Annexure 4 to the petition.

12. The petitioner submits that he has no other remedy open to him against the judgments, Annexures 3 and 4, except to approach this Hon'ble Court under Articles 226 and 227 of the Constitution.

13. The petitioner accordingly files this petition on the following:

The applicability of the rules of natural justice cannot be excluded by legislation to any matter where such exclusion would have the effect of curtailing a person's fundamental rights guaranteed by, say, Article 14, 19, 21 (*Maneka Gandhi* v. *Union of India*, A 1978 SC 597; *R.D. Shetty* v. *I.A Authority*, (1979) 3 SCC 489) or 22 (5) of the Constitution. (For Articles 21 and 22, see notes *ante* under precedents relating to Habeas Corpus).

The principles of natural justice are, however, not rigid rules but are flexible and vary with difference in situation (*State of Gujarat* v. *Anand Municipality*, A 1993 SC 1196; *Union of India* v. *W.N. Chadha*, A 1993 SC 1082; *Ravi S. Naik* v. *Union of India* A 1994 SC 1558). There is exclusion of the application of *audi alteram partem* rules to cases where nothing unfair can be inferred by not affording an opportunity to present and meet a case (*Union of India* v. *W.N. Chadha*, A 1993 SC 1082 at page 1102). It is upto the competent authority to decide whether in the given circumstances the opportunity to be provided should be a prior one or post-decisional opportunity. Normal rule, of course, is prior opportunity (*State of U.P.* v. *Vijay Kumar Tripathi*, A 1995 SC 1130). Principle of natural justice is not to be stressed too far, for the principle of natural justice does not mean that personal hearing be afforded in each case, it depends upon the facts and circumstances of each case (*Pyare Lal Tandan* v. *State*, 1994 ALJ 288 (All) DB). The principles of

Grounds

(a) Because section 21, sub-section (1A) of the Act provides that where a landlord has on account of his employment been living in a different city and is required on cessation of his employment to vacate the accommodation provided by his employer his need for residential occupation of a building owned by him shall be deemed sufficient, and Respondents Nos. 1 and 2 had committed a manifest error of law in ignoring this legal presumption, which was a relevant factor in deciding the petitioner's application.

(b) Because Respondents Nos. 1 and 2 had by basing their decision on the ground of the petitioner's means to build another house taken in to account a factor which was irrelevant for purposes of deciding an application under section 21 of the Act.

(c) Because Respondent No.2 had by referring to the respective financial capacity of the parties again taken into account an irrelevant factor.

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natural justice do not imply a right to hearing before passing of impugned order. Affording post facto hearing and judicial review ensure sufficient compliance with principles of nutural justice (*Haryana Warehouse Corporation* v. *Ram Avtar*, (1996) 2 SCC 98).

The right of oral hearing and inquiry and of cross-examination of witnesses would be insisted on in case of disciplinary action governed by Article 311 (2) of the Consitution, but not in case of imposition of minor penalties or in respect of numerous other adverse orders by various statutory authorities where an opportunity of submitting a written explanation would be deemed sufficient, e.g., penal action against a student on allegations of use of unfair means at an examination or of other misconduct (*Hiranath Misra* v. *Principal, Rajendra Medical College*, A 1973 SC 1260). In some cases where the authority is obliged to take immediate action in the public interest it is deemed sufficient if a post-decisional opportunity is given to the party against whom action was taken so that if the explanation subsequently preferred is satisfactory the action earlier taken may be reversed or recalled to the extent practicable (*Swadeshi Cotton Mills* v. *Union of India*, A 1981 SC 818; *Maneka Gandhi* v. *Union of India*, A 1978 SC 597). No opportunity of making representations or objections is required to be given in respect of legislative act of Legislature or, unless expressly required by the statute, in respect of making of a rule or other instrument of a legislative character (*Lakshmi Khandoori* v. *State of U.P.*, A 1981 SC 873).

So far as proceedings in a Court or a formally constituted tribunal which has some or all the trappings of a court are concerned, there is hardly any scope for

(d) Because Respondent No.2 had committed a manifest error of law in relying on the indeterminate theoretical concept of social and economic justice as overriding the specific and unambiguous provisions of section 21 of the Act, the constitutionality of which was neither questioned nor open to question before him.

(e) Because Respondents Nos.1 and 2 had committed a manifest error of law in holding the petitioner's application to be premature as they ignored the Explanation to section 21 (1A) which provides that an application on the ground mentioned in that sub-section can be filed up to one year before the date of the landlord's retirement.

(f) Because Respondent No.2 had also acted in breach of the principles of natural justice by declining to hear the arguments of the petitioner's Counsel.

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exclusion of the applicability of the rules of natural justice, though even in respect of such purely judicial proceedings a summary procedure could be laid down by the legislature in respect of less important cases, e.g., small cause suits and trials for petty offences. Moreover, in a civil suit oral examination and cross-examination of witnesses is a must at the final hearing stage but affadavit not cross-examined may be accepted at the stage of interlocutory proceedings. Cases of a civil nature may also be finally disposed of on the basis of affidavits by tribunals, where the provisions of C.P.C. do not apply in toto, e.g., eviction cases between landlord and tenant under U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, though the tribunals are manned by presiding officers of regular civil courts (*Manilal Tripathi* v. *Kamla Devi*, 1981 ALJ NOC 127).

A civil court is given express power of reviewing its orders and decisions in certain circumstances (section 114 and O. 47); so is the Supreme Court (Article 137 of the Constitution); the High Court as a Court of plenary jurisdiction has inherent power to review its orders in exercise of writ jurisdiction (*Shivdeo Singh* v. *State of Punjab*, A 1963 SC 1909). A criminal court (including the High Court) has, however, no inherent power to reveiw (*State of Orissa* v. *Ram Chander*, A 1979 SC 37, (1979) 2 SCC 305). A court or quasi-judicial tribunal or authority has no inherent power to review its decisions unless such power is expressly conferred by the law under which the court or tribunal is constituted (*Harbhajan Singh* v. *Karan Singh*, A 1966 SC 641, (1966) 2 SCR 817). But if the original order passed by it was vitiated by breach of the rules of natural justice the court or other judicial or quasi-judicial tribunal or authority can, even in the absence of any express provision in that behalf, treat the earlier order as *non-est*, whether by formally recalling it or otherswise, and proceed to pass a fresh order after following the rules of natural justice (*Chet Singh* v. *State of Punjab*, (1977) 2 SCC 499). Moreover, purely routine orders of an interlocutory nature are not necessarily immune from recall even though no

(g) Because the facts being undisputed the only possible order that Respondents Nos.1 and 2 could have passed in view of the provisions of section 21 of the Act was to allow the petitioner's application for release of the house in his favour and to evict Respondent No.3.

Prayer

(i) A writ of Certiorari be issued calling for bringing up the record of the aforesaid proceedings before Respondents Nos.1 and 2 and quashing the judgments and orders copies of which are Annexures 3 and 4 and (ii) in their place an order be passed under section 21 of the Act allowing the petitioner's application for release of the house No.345, Arjun Nagar, Gorakhpur in favour of the petitioner and for eviction of Respondent No.3 therefrom with costs of both the courts/tribunals below.

(iii) Costs of this petition be awarded against Respondent No.3.

[This precedent can be adapted to meet numerous similar other situations, for instance, to question decisions of revenue courts (including Board of Revenue or State Revenue Tribunal), consolidation of holdings tribunals, tribunals constituted under the Urban Land (Ceiling or Regulation) Act or similar State laws relating to agricultural rural land, customs, income tax or sales tax or motor vehicles tax, etc., tribunals, Company Law Board, revisional decisions of Chancellor or Vice-Chancellor of a University in service matters or

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express provision for review may be found in the statute (*Debi Prasad* v. *Khelawan*, A 1957 All 67 DB in which *C.B. Agarwala J.'s* judgement contains an excellent summary of the law on the subject of review).

A writ of *certiorari* may thus be issued in cases of want, excess or abuse of jurisdiction (which includes cases of violation of principles of natural justice, and of exercise of power of review where non exists), and exercise of jurisdiction on grounds extraneous to those on which it is exercisable or after disregard of relevant grounds (*H.T. Kamath* v. *Ahmad Ishaque*, A 1955 SC 233; *S. Govinda Menon* v. *Union of India*, A 1967 SC 1274; *Asst. Collector, C.E.* v. *National Tobacco Co.*, A 1972 SC 2562; *Geep Flashlight* v. *Union of India*, A 1977 SC 456). It may also be sought on grounds of manifest error of law, even though the error may not go to the root of jurisdiction (*H.T. Kamath*, supra; *S. Govinda Menon*, supra). However, the writ may not be sought merely to correct a wrong finding on facts arrived at on a matter within the jurisdiction of the tribunal, for the High Court or Supreme Court do not exercise appellate jurisdiction under Articles 226 and 32 while dealing with such writ petitions (*Syed Yaqub* v. *Radhakrishnan*, A 1964 SC

election disputes, decisions of election tribunals hearing petitions challenging election to local bodies, etc., and of statutory arbitrators (such as Registrar, Co-operative Societies) and so forth].

No. 10— Petition for Writ of Certiorari and Mandamus in respect of Quasi-Judicial Proceedings

1. The petitioner was employed under the State of Uttar Pradesh (Respondent No.1) holding the civil post of assistant office superintendent in the Collectorate, Meerut, having been appointed to that post by the

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477; *Nagendra N. Bora* v. *Commissioner*, A 1958 SC 398; *Babhutmal* v. *Laxmibai*, A 1975 SC 1297) a manifestly wrong finding on a jurisdictional fact may, however, it is arguable, be corrected on certiorari as a tribunal cannot be permitted, by giving such finding, to confer jurisdiction on itself where none exists (*Roshanlal Mehra* v. *Ishwardas*, A 1962 SC 646 a case relating to revisional power; see, however, *Labh Kr.* v. *Jaiwardhan*, A 1983 SC 535; *Basappa* v. *Nagappa*, A 1954 SC 440; *Raja Anand Brahma Shah* v. *State of U.P.*, A 1967 SC 1081).

A statute may, however, confer on the tribunal final power to decide even such jurisdicional facts, in which case Certiorari cannot be sought on the ground of erroneous finding (*India Pipe Fitting Co.* v. *F.M.A. Baker*, A 1978 SC 45). A finding of fact which is based on no evidence at all (*Mukunda Bose* v. *Bangshidhar*, A 1980 SC 1524) or which is so perverse that no reasonable person could arrive at it (*Nanha* v. *Deputy Director Consolidation*, A 1976 All 91, FB) is, however no finding in the eye of law and may be reviewed as such on Certiorari. Likewise, a finding which is reached through misapplication or non-application of the relevant legal principles (*Nanha*, supra) or is based merely on surmises and conjectures, as distinguished from circumstantial inferences, (*Subhash Chandra* v. *Board of Revenue*, (1980) 3 SCC 234) or on misreading of evidence or of pleadings (*Nanha*, supra; *Rukmanand* v. *Bihar*, A 1971 SC 746) may be quashed on Certiorari. A tribunal is, however, not bound, in the absence of express statutory provision in that behalf, by the strict rules of admissibility and reception of evidence contained in the Evidence Act, the C.P.C. or the Cr.P.C., and may be allowed to act on any piece of evidence which a reasonably prudent person may consider to have probative value (*Nand Kishore Pd.* v. *State of Bihar*, A 1978 SC 1277) including, say, what would be considered by a Civil or Criminal Court to be hearsay evidence (*State of Haryana* v. *Ratan Singh*, A 1977 SC 1512) or a certified copy of an application or a registered deed where the original was not summoned and signature of the purported executant on the original was not formally proved but there exist no circumstances to cast doubt on the genuineness of the original document.

Unlike a consensual arbitrator (who may validly make an unspeaking award), a tribunal or other quasi-judicial authority (inlcuding a statutory arbitrator) is normally expected to pass a reasoned, i.e. speaking order, for failure to give reasons, unfairly

Collector, Meerut, (Respondent No.2) on September 10, 1970. A true copy of the appointment order is Annexure 1 to this petition.

2. On April 22, 1991, disciplinary proceedings were commenced against the petitioner by issuance of a charge-sheet. A true copy of the charge-sheet is Annexure 2 to this petition.

3. The petitioner replied to the charge-sheet denying the charges and asking for supply to him of copies of the documents relied on in the charge-sheet and also demanding an oral inquiry at which he might cross-examine the witnesses against him and produce witnesses in his defence. A true copy of the petitioner's reply is Annexure 3 to this petition.

4. Neither the said documents were furnished to the petitioner, nor was any oral inquiry held.

5. On June 1, 1991, the Additional District Magistrate (Respondent No.3) passed an order saying that the petitioner's reply was not satisfactory and purporting to dismiss the petitioner from service. A true copy of his order is Annexure 4 to this petition.

6. The petitioner preferred an appeal against the said order to the Commissioner, Meerut Division (Respondent No. 4) who dismissed the same on October 15, 1991. A true copy of his order is Annexure 5 to this petition.

7. The petitioner on July 15, 1994 filed a claim before the Public Services Tribunal (Respondent No.5) constituted under U.P. Public

deprives the party against which the order is made from knowing whether the authrotity arrived at its decision on valid grounds or not. A writ of Certiorari may, therefore, be issued for quashing such decisions (*Siemans* v. *Union of India*, A 1976 SC 1785; see however, *Rana Natwar Singh* v. *State*, A 1980 MP 129, FB). The tribunal may, whenever its order is quashed on any procedural ground, thereafter pass a freash order in accordance with law (*Anand Narain Shukla* v. *State of M.P.*, A 1979 1923).

There had been conflict of opinion on the question of the consequences of non-supply of the Inquiry officer's report to the delinquent employee. A constitution Bench of the Supreme Court, has settled the conflict thus— (i) An employee is entitled to a copy of the inquiry report even if the statutory rules do not permit the furnishing of the report or are silent on the subject; (ii) Whenever the service rules contemplate an inquiry before a punishment is awarded and when the enquiry officer is not the disciplinary authority, the delinquent employee will have the right to receive the enquiry officer's report whatever be the nature of punishment; (iii)

Services Tribunals Act, 1976 ("the Act") contending that the aforesaid orders passed against him were void on various grounds. A copy of the said claim petition is Annexure 6 to this petition.

8. The Tribunal by its order dated September 15, 1994 (a true copy of which is Annexure 7 to this petition) dismissed the claim of the petitioner as time barred being filed more than three years after the order of the Additional District Magistrate, Annexure 4 though it was within three years from the date of the appellate order of Commissioner, Annexure 5.

9. The petitioner has no other alternative efficacious remedy against the aforesaid order as a civil suit to question these orders is barred by section 6 of the Act.

10. The petitioner gave notice to the State Government (through the Secretary, General Administration Department) Respondent No.1 on October 1, 1994 demanding reinstatement of the petitioner on his post with back wages, continuity of service and other consequential benefits, but although more than six weeks have passed the petitioner has not received any response to the said demand. The petitioner is not being paid any salary or being otherwise treated as in service.

Failure to ask for the report cannot be construed as waiver of the right. Report is to be furnished whether the employee asks for it or not; (iv) The law laid down in *Union of India* v. *Mohd. Ramzan Khan*, A 1991 SC 471 is applicable to all employees in all establishments— Government, public or private; (v) Whether prejudice has been caused on account of denial of report has to be considered on the facts of each case. The relief to be granted to the employee would depend on the actual consequence of denial of the report; (vi) The ratio of *Ramzan Khan* is prospective and is to be applied only to those orders of punishment which are passed by the disciplinary authority after Novermber 20, 1990; (vii) Orders of punishment passed before November 20, 1990 where inquiry report was not furnished should not be disturbed and the proceedings cannot be reopeneed on that account (*Managing Director* v. *Karunakar*, (1993) 4 SCC 727, A 1994 SC 1074).

Parites : In a petition for a writ of Certiorari or Prohibition, even though it may arise out of a litigation between private parties in an inferior court or tribunal, not only the opposite-party to the litigation but also the inferior court or tribunal whose order, decision or jurisdiction is sought to be assailed must be impleaded as a respondent, though normally such *pro forma* respondent does not enter appearance to contest unless *mala fide* in pleaded against it.

Mandamus may be sought against government or any other authority, whether executive or judicial, in order to compel it to discharge its public functions in

11. The petitioner accordingly prefers this writ petition under Article 226 of the Constitution on the following :

Grounds

(a) Because the Additional District Magistrate (Respondent No.3) was an authority subordinate to the District magistrate (Respondent No. 2) who had appointed the petitioner to the post of Assistant Office Superintendent

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accordance with law. It would lie not only against a positive act or order of the authority but even against its inaction where the authority fails to discharge its legal duty to act in a certian manner. It is not only necessary that the authority should be under a legal duty in the matter but also that the petitioner should have a legal right. A mere busybody without any sufficient or substantial interest or right in the matter cannot aproach the court (*Jasbhai* v. *Roshan Kumar*, A 1976 SC 578) though in respect of "public interest litigation" the principle of *locus standi* has been considerably liberalised (*S.P. Gupta* v. *President of India*, 1981 SCC Supp 87, A 1982 SC 149).

Where a matter is entrusted by law to the discretion of an authority, the High Court or the Supreme Court will not in exercise of its jurisdiction to issue a Writ of Mandamus substitute its own discretion for that of the authority (*State of M.P.* v. *G.C. Mandwar*, A 1954 SC 493). Where, however, the authority in the purported exercise of its discretionary power, misapplies or misinterprets the law and thereby misconceives the scope of its discretion, or fails to take relevant factors, which are required by law to be considered, into account, or takes irrelevant factors or extraneous purposes into consideration, the Court will interfere (*Asstt. Controller of E.D.* v. *Prayag Das Agarwal*, A 1981 SC 1263; *Rohtas Industries* v. *S.D. Agarwal*, (1969) 1 SCC 325). Such an order of the statutory authority is vitiated by malice in law (*S.Venkataraman* v. *Union of India*, A 1979 SC 49). An order passed in bad faith, i.e., actuated by malice in fact is also not a valid order, for good faith is an essential condition of the exercise of every public power (*Pratap Singh* v. *State of Punjab*, A 1964 SC 72 ; *C.S. Rowji* v. *State of A.P.*, A 1964 SC 962; *State of Punjab* v. *Gurdial Singh*, A 1980 SC 319; *Mohinder Singh Gill* v. *C.E.C.*, A 1978 SC 851). In such cases the Court would normally strike down the order and leave or require the authority to pass a fresh order in accordance with law (*State of Mysore* v. *C.R. Sheshadri*, A 1974 SC 460, (1974) 4 SCC 308). However, in exceptional cases where the facts are undisputed and do not requre to be investigated afresh and where on the application of correct legal principles as laid down by the High Court the matter can on being remitted back to the authority to pass such specific order as ought to be passed by the authority, an order of promotion instead of a mere direction to consider the petitioner's case for promotion as is usually ordered. *District Registrar* v. *M.B. Koyakutty*, (1979) 2 SCC 150.

A Mandamus cannot be issued against the Legislature or any of its Houses.

and as such was not competent, in view of clause (1) of Article 311 of the Constitution, the pass the order of dismissal Annexure-4.

(b) Because the order of dismissal Annexure-4 was passed without giving the petitioner a reasonable opportunity of showing cause as required by clause (2) of Article 311 of the Constitution and rule 55 of the Civil Services (Classification, Control and Appeal) Rules.

(c) Because the Pubic Services Tribunal in taking the view that the petitioner's claim was time-barred had committed a manifest error of law in that it had ignored the proviso to section 4 (1) of the Act according to which no claim against the order of dismissal could ordinarily be entertained by the Tribunal until the petitioner had exhausted the remedy of departmental appeal provided by the Service Rules. In view of this proviso the time taken in pursuing the departmental remedy was liable to

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not only because any irregularity of procedure is not in view of Article 122 and 212 of the Constitution justiciable, but also on general constitutional principles, though the validity of an Act of Legislature or an act of delegated legislation can always be examined by the Courts on the ground either of violation of a fundamental right (vide Article 13 of the Constitution) or of violation of any other constitutional provision, or on the ground that the Legislature has abdicated its responsibility by granting excessive delegation of its pwers to the executive (*In re Delhi Laws Act*, A 1951 SC 332; *Kerala S.E.B.* v. *Indalco*, (1976) 1 SCC 466). A House of Parliament or a State Legislature while exercising its contempt jurisdiction or passing any order in its privilege jurisdiction is, however, according to the Supreme Court an "authority" within the meaning of Artice 12 or Article 226 of the Constitution, and a citizen can approach the court with a complaint of breach of his fundamental right (In re President Ref., U.P. Assembly Case, A 1965 SC 745), but Houses of Parlicament and of State Legislature and their presiding officers have not acquiesced in this view and continue to insist that they are not subject to courts' jurisdiction in these matters. A piece of subordinate legislation can also be assailed on the ground that the quasi-legislative authority has in promulgating it exceeded the powers delegated to it (*State of Kerala* v. *K M C Abdulla & Co.*, A 1965 SC 1585).

A writ of Mandamus lies not only against government and other authorities under the government or governmental officers exercising statutory powers, but also against autonomous corporations if they are entrusted with the discharge of public functions. Corporations, amenable to Mandamus are not only those created by or under any law, *i.e.*, statutory corporations such as Life Insurance Corporation, Nationalised Banks, Universities, State Financial Corporations, State Electricity Boards, State Road Transport Corporation, etc., (*Sukhdev* v. *Bhagwan Ram*, A 1975 SC 1331), but even companies (registered under the

be excluded in accordance with the principle underlying section 15(2) of the Limitation Act.

Prayer

(i) A writ of Certiorari be issued calling for bringing up the record of the proceedings before the Additional District Magistrate (Respondent

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Companies Act), societies (registered under the Societies Registration Act) and co-operative societies (registered under the Co-operative Societies Act). If such company or society is an instrumentality of the government created by the latter for more convenient discharge of its functions.

The tests for determining whether a body is an instrumentality or agency of government, approved in subsequent decisions as summarised in *Ajay Hasia* v. *Khalid Mujib*, A 1981 SC 487, (1981) 1 SCC 722, are as follows : (1) If the entire share capital is held by government it would go a long way towards indicating that the body is such an instrumentality; (2) If the financial assistance of the State meets almost the entire expenditure of the body it would afford some indication of the body being such an instrumentality; (3) It would be indicative of the same, if the body enjoys monopoly status which is State conferred or State protected; (4) Existence of deep and pervasive State control may indicate that the body is such instrumentality; (5) Its functions are of public importance and closely related to governmental functions, that too would point in the same direction; (6) If a department of government is transferred to a corporation, it would strongly lead to such inference (See also *Housing Board Haryana* v. *Haryana Housing Board Employees Union*, A 1996 SC 434; *Unni Krishnan* v. *State of A.P.*, A 1993 SC 2178; *U.P. Warehousing Corporation* v. *Vijai Narain*, A 1980 SC 840; *Tekraj Vasanti* v. *Union of India*, A 1988 SC 469; *All India Sainik Schools Employees Association* v. *Sainik School Society*, A 1989 SC 88; *Central Inland Water Corporation* v. *Brojo*, A 1986 SC 1371; *State Enterprises* v. *CIDC*, (1990) 3 SCC 280). A private educational institution not an instrumentality of the State merely because it has received affiliation or recognision from the State (*Unni Krishnan* v. *State of A.P.*, A 1993 SC 2178). If a writ petition is directed against such a body the relevant facts and circumstances on the basis of which it is claimed to be an instrumentality of the State should be clearly pleaded and cannot, unless well known or accepted in other judicial decisions, be assumed. But even if the body is an instrumentality of the State, writ petition will not lie against it unless it acts either in contravention of some statutory provision or in a discriminatory and arbitrary manner and in breach of fundamental right of equality guaranteed by Article 14 of the Constitution (*Ajay Hasia* v. *Khalid Mujib*, A 1981 SC 487)

A writ of Mandamus will not, however, be against a private individual or against a co-operative society, other society or company which is not an instrumentality of the State, unless such individual or body has benefited from the impugned order of, and is in collusion with, the authority against which Mandamus

No.3), the Commissioner of the Division (Respondent No.4) and the Public Services Tribunal (Respondent No.5) and quashing the orders Annexures Nos.4, 5 and 7 passed by them respectively;

(ii) A writ of Mandamus be issued against Respondents No.1 and 2 directing them to forbear from acting upon the orders Annexures Nos.4, 5 and 7 and to treat the petitioner as having continued in service throughout and to pay his salary and allowances and to give all other consequential benefits of continuity in service treating the said orders as *non-est;*

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is sought, in which case such private individual or body should also be impleaded as a respondent along with the authority so that the order may be equally binding on him or it (*Sohan Lal* v. *Union of India*, A 1957 SC 529). Where there is unexplained delay in filing the writ petition, and the writ petition suffers from laches, the same is liable to be dismissed (*S.A. Rasheed* v. *Director of Mines and Geology*, A 1995 SC 1739; *Bihar State Housing Board* v. *State of Bihar*, A 1995 Pat 131 DB).

Even against a government or other authority (including an instrumentality of State, as explained above) Mandamus can be sought only in respect of its discharge or non-discharge of public functions but not in respect of exercise by it of its powers under a contract (*Radhakrishna Agarwal* v. *State of Bihar*, A 1977 SC 1496), even if the exercise of such contractrual power be contended to be violative of the principle of *audi alteram partem (Jai Narain Singh* v. *State of Bihar*, A 1980 Pat 24). However, Courts will interfere if the government or other authority acts in a discriminatory manner at the threshold of entering into a contract, e.g, by awarding contract to an ineligible party (*Ramanna D. Shetty* v. *I.A. Authority*, A 1979 SC 1628) or by refusing without good ground to entertain the case of an eligible party, by 'blacklisting' it or otherwise (*Erusian Equipment Co.* v. *W. Bengal*, A 1975 SC 260). Mandamus may also lie in respect of exercise of even outwardly contractual powers if the contract is pursuant to a statutory duty (see decision in *Radhakrishna Agarwal* v. *State of Bihar*, A 1977 SC 1496; *Gujarat State Financial Corporation* v. *Lotus Hotels*, A 1983 SC 848, (1983) 3 SCC 379).

A formal demand to the authority is normally necessary before approaching the court for Mandamus (*State of Haryana* v. *Chanan Mal*, A 1976 SC 1654). A writ of Mandamus may also be combined with a Writ of Certiorari, Prohibition or Quo Warranto.

Writ of Prohibition : Like a Writ of Certiorari it lies only against an inferior Court, tribunal or other quasi-judicial authority (see notes on this topic under precedents re : Certiorari). It does not lie against a purely executive authority though often pleaders, on account of its phonetic and etymologic resemblance with an order of prohibitory injunction under the Specific Relief Act or under the C.P.C., seek this writ even against executive authorities also. Actually, Mandamus itself, unlike an order or mandatory injunction, can be both in positive terms as well as negative terms, directing the authority to act in a certain maner as also directing it to

(iii) In the alternative to relief No.(ii) above, direction or order be issued to the Tribunal, Respondent No.5 to treat the petitioner's claim petition as within time and to decide the same on merits afresh in accordance with law.

(iv) Costs of this petition be awarded against Respondents Nos.1 to 3.

[This precedent can be adapted to meet numerous similar service matters, e.g. to question an order of termination of service, reversion, compulsory retirement, denial of promotion, determination of seniority, reduction of pension, etc., and also in other than service matters where the authorities are required to follow the rules of natural justice or rules of fair play].

No. 11—Petition for a Writ of Mandamus against Government or an Officer of Government

1. The petitioner is owner of house No.65, Ashok Marg, Patna.

2. On May 15, 1991 the State Government (Respondent No.1) issued a notification under section 4 of the Land Acquisition Act 1894 ("the Act") proposing to acquire certain lands including plot No.65 on which the petitioner's house is situated. A true copy of the notification is Annexure No.1 to this petition.

3. On July 10, 1994 the State Government issued a notification under section 6 of the Act in respect of the same lands. A true copy of the notification is Annexure No.2 to the petition.

4. No opportunity of filing objections against the proposed acquisition was given to owners of land as required by section 5A of the Act.

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desist from acting in another manner.

A Writ of Prohibition is much rarer than a Writ of Certiorari. The difference between the two is that the former prohibits the judicial or quasi-judicial authority (for short, "tribunal" including a court as well as an executive authority required to follow a quasi-judicial procedure) from acting further in a matter while the latter quashes an order already passed by the authority. Hence, in the former case the High Court would generally expect the aggrieved party to raise the objection, being canvassed before the High Court, before the inferior tribunal itself and only if the latter overrules the objection, then to approach the High Court seeking a Writ of Certiorari. For after all even an objection as to jurisdiction can be raised before the

5. The State Government in the said notification under section 6, Annexure 2, invoked the provisions of section 17 (1) of the Act on the ground that it was satisfied that there was urgent need to acquire the land for purposes of establishing a Community Television Centre and that section 17 of the Act was applicable.

6. The Collector, Patna (Respondent No.2) has issued notice to the petitioner under section 9 of the Act on July 20, 1994. A true copy of the same is Annexure 3 of the petition.

7. The petitioner on July 30, 1994 gave notice to Respondents Nos.1 and 2 demanding that they desist from acting in pursuance of the said illegal orders (Annexures 1, 2 and 3), but they have ignored the said notice and are instead insisting on taking immediate possession of the petitioner's said land.

8. The petitioner has no alternative or efficacious remedy available to him except to approach this Hon'ble Court under Article 226 of the Constitution on the following—

Grounds

(a) Because the purported satisfaction of Respondent No.1 under section 17 (1) of the Act was no "satisfaction" in the eye of law and section 17 (1) could not be invoked legally in that—

Firstly, the petitioner's land was not 'waste or arable land' but had a house built thereon, whereas section 17 (1) does not apply to such land;

Secondly, the very fact that the State Government took such a long time in issuing the notification under section 6 after having issued the notification under section 4 shows that the State Government itself did not

concerned tribunal (*Chanan Singh* v. *Registrar, Co-operative Societies*, A 1976 SC 1821). The party complaining may in such cases raise a preliminary objection as to jurisdiction before the tribunal concerned and invite its decision thereon, and if the latter overrules the objection, then the party may ask for Certiorari against the order overruling the objection and for Prohibition against the tribunal proceeding further. In some cases, however, the tribunal has either expressly or impliedly already taken the view that it does have jurisdiction although on the true view of the law it does not. The High Court or where a breach of fundamental right is involved, the Supreme Court may in such cases not insist on the party undergoing unnecessary harassment, trouble and expense likely to be entailed and incurred by its having to defend itself before a tribunal not possessed of the requisite jurisdiction

treat the matter as urgent; on the other hand, the preferring and disposal of objections under section 5A would have taken much less time;

Thirdly, the need for a Community Television Centre could not be treated by any reasonable person to be exceptionally urgent need;

Fourthly, that in view of the above the purported "satisfaction" of the State Government suffered from malice in law and from want of fulfilment of conditions precedent laid down in section 17(1).

(b) Because no declaration under section 6 could be issued after the expiration of a period of three years from the publication of notification under section 4, in view of the second proviso to section 6 (1).

(c) Because under Article 300-A of the Constitution the petitioner's property cannot be acquired otherwise than in accordance with law.

Prayer

(i) A Writ of Mandamus be issued to Respondents Nos.1 and 2 to forbear from acting upon orders Annexures Nos.1, 2 and 3 and to treat them as *non est* and to desist from interfering with the petitioner's ownership and possession of house and plot No.65 aforesaid, and a direction or Order be issued to quash the said orders Annexures Nos.1, 2 and 3.

(*Calcutta Discount Co.* v. *I.T.O.*, A 1961 SC 372).

Lack of jurisdiction may be of several kinds. The matter in respect of which the proceeding has been initiated may be outside the scope of the powers entrusted to the authority; or the conditions precedent for the proposed exercise of the power may be lacking or the facts on which the jurisdiction may be dependent may be non-existent; or the procedure being followed by the authority may be contrary to the rules or natural justice applicable to the matter, e.g., the authority may be baised or interested; or it may have denied the party affected a right to be heard (see generally, *H.V.Kamath*, supra; *Calcutta Discount Co.*, supra). Where jurisdiction of the tribunal is dependent on determination of facts then the tribunal should first be allowed to determine the facts and a pre-emptive approach to the High Court will be countenanced (*D.V.C.* v. *Superintendant of Commercial Taxes*, A 1976 Cal 136). The allegations regarding the violation of Constitutional provision should be specific, clear and unambiguous and should give relevant particulars (*Amrit Banaspati Co. Ltd.* v. *Union of India*, A 1995 SC 1340.

If the facts alleged in writ petition are not specifically controverted, they shall be deemed to have been admitted in favour of the petitioner (*Tikka Bai* v. *Divisional Commissioner Bikaner*, 1995 (3) WLC 525 Raj; *Sitaram* v. *Assistant Commissioner, Jamkhandi*, 1995 (3) Kar LJ 501 Kant). The High Court exercising

(ii) Costs of this petition be awarded to petitioner against Respondents Nos.1 and 2.

No. 12—Like Petition against a Statutory Corporation

Apart from other paragraphs adapted from precedent No.11, add in the beginning—

1. Respondent No.1 is a Corporation constituted by [or, under].....Act, [*or*, rule.....made under.....Act] and is charged with the performance of public functions and duties laid down in the said Act [*or*, rule] and as such is an "authority" within the meaning of Articles 12 and 226 of the Constitution.

No. 13—Like Petition against a Non-Statutory Body

(a government company, society or co-operative society, etc.)

Apart from other paragraphs adapted from precedent No.11, add:—

[1. Respondent No.1 is a government company registered as such under the Companies Act, and cent percent (*or*, more than 50%- specify exact or appropriate percentage as may be ascertained) of its share capital is subscribed by the Central Government and/or the State Government.

[*Or*, Respondent No.1 is a society registered under the Societies Registration Act, and is wholly (*or*, specify correct extent) financed by the Central government and/or the State Government].

[*Or*, Respondent No.1 is a co-operative society registered under the Co-operative Societies Act (specify name of Act applicable in particular State) and its share capital is wholly (*or*, partly—specify correct or approximate extent as may be ascertained) subscribed by the Central Government and/or the State Government].

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the power under Article 226 of the Constitution is not like an appellate authority to consider the dispute. It has to see whether the impugned order is based on records or whether the authorities have applied their own mind to the relevant facts (*State of U.P.* v. *Committee of Management of S.K.M. Inter College*, (1995) 2 MLJ (SC) 79). The court refuses to grant the discretionary relief, when the person approaches it with unclean hands or blameworthy conduct (*State of Maharashtra* v. *Digambar*, (1995) 3 ALT 11 SC).

Jurisdiction may, moreover, be territorial or pecuniary or with reference to

2. The main objects as specified in the Memorandum of Association of Respondent No.2 are—

(a) .....

(b) ..... etc.

3. The said functions were originally performed directly by.....Department of the Central/State Government and the said Government decided to and did promote and form Respondent No.1 as an autonomous body for the more efficient performance of those functions.

(*Or*, The said activities were originally carried out by various units in the private sector and because of various evils found in the operation of these units the Central/State Government decided that it would be in the public interest to have the said activities carried out exclusively through an official sponsored and controlled agency with a view to ensuring that the Directive Principle of State policy [specify, with particular Article of the Constitution] mentioned in part IV of the Constitution was duly observed).

(*Or*, The said unit was originally a private enterprise but under the scheme of notification approved by Parliament/ State Legislature it was vested in the Central/State Government and under section ..... of the.....Act it stood transferred to the Government company (Respondent No.1) which was sponsored and formed at the initiative of the said Government in anticipation /pursuance of said legislation.

4. The Central/State Government exercises its substantial control over the affairs of Respondent No.1 in that—

(i) Appointment and removal of Directors/ Auditors/officers/ staff : (relevant provisions to be referred to).

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subject-matter. In some cases jurisdiction of the tribunal may have been ousted by some statutory provision; where it is so a Writ of Prohibition against the tribunal will be quite apropriate.

Successive Writ Petitions

Where the earlier writ petition has been dismissed as not pressed or withdrawn without leave to file fresh writ petition on the same cause of action, second writ petition for the same relief is barred (*Syed Nizam* v. *First Addl. Civil Judge, Faizabad*, A 1995 All 255, *Pradeep Goel* v. *Regional Manager, Region II*, 1992 1.CD 84 (All). Where an earlier writ petition is pending, a second writ petition containing similar

(ii) Control of funds budget audit (including facts relating to extent of Governmental accountability to Legislature for its affairs): (relevant provisions to be referred to).

5. Facts showing creation of monopoly, if any, in favour of Respondent No.1 (relevant provisions to be quoted).

6. That in view of the facts stated in the foregoing paragraphs Nos. 4 and 5 the Respondent No.1 is an instrumentality of the Central/State Government and as such is an "Authority" or "State" within the meaning of Article 12 and 226 of the Constitution.

No. 14— Petition for Writ of Prohibition and other Ancillary Reliefs against Proceedings in a Court

1. The petitioner was prosecuted for an offence under section 392, I.P.C. in the Court of Sessions Judge, Sultanpur, (Respondent No.1) in Sessions Trial No.18 of 1993 which resulted in acquittal of the petitioner on September 25, 1994. A copy of the order of the said Court of Session is Annexure No.1 to this petition.

2. No appeal against the said order of acquittal of the petitioner was filed by the State Government within time, and the said order has become final.

3. On July 15, 1995 the Public Prosecutor namely the District Government Counsel (Criminal) (Respondent No.2) under instruction from the States Government (Respondent No.3) made an application to the said Court for a review of its judgment dated September 25, 1994. A true copy of the application is Annexure No.2 to this petition.

4. The said Court (Respondent No.1) has by its *exparte* order dated October 15, 1995 entertained the application and directed notice

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prayer does not lie (*Atif Ahmad* v. *Chief Minister, UP*, 1996 All LJ 101 (All) DB).

Joint Writ Petition

Where the petitioners have common cause of action viz. grouse against the same order, joint writ petition by them is maintainable (*Jagat Narayan Sharma* v. *State of Rajasthan*, A 1995 Raj 155; *Nilamadhaba* v. *Orissa University of A & T*, A 1983 Ori 17; *Balwinder Singh* v. *University of Jammu*, A 1983 J & K 19; *Teja Singh* v. *Union Territory Chandigarh*, A 1982 P & H 169 (FB)). In dealing with applications for compensation for the enforcement of the right to life, enshrined in Artele 21 of the Constitution, the Court should not adopt a hypertechnical approach

to be issued to the petitioner to show cause. A true copy of the said order is Annexure 3 to the petition.

5. The notice aforesaid has put the petitioner's liberty into jeopardy for the second time after he had already been acquitted finally.

6. The petitioner submits that the said Court has no jurisdiction to proceed in the matter.

7. The petitioner has no other efficacious remedy against the continuance of the proceedings and accordingly files this petition under Article 226 of the Constitution on the following :—

Grounds

(a) Because the Court of Sessions, Respondent No.1, has not been empowered by the Code of Criminal Procedure 1973 to review any judgment nor does that court possess any inherent power in that behalf.

(b) Because the review sought amounts to re-trial of the petitioner by the trial Court without any order of any superior Court in that behalf, and in view of the judgment dated September 25, 1994 (Annexure 1) having become final, such re-trial is barred by the provisions of section 300 of the said Code and is also violative of the petitioner's fundamental right against double jeopardy guaranteed by Article 20 (2) of the Constitution.

Prayer

A Writ of Prohibition be issued to Respondent No.1 prohibiting it from proceeding further in the proceedings initiated by the application dated July 15, 1995 given by respondent No.2 under instructions from Respondent No.3.

A Writ of Certiorari be issued calling for the bringing up of the record of the said proceedings and quashing the order passed by Respondent No.1, copy of which is Annexure 3.

Costs against Respondents Nos.2 and 3.

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which would defeat the ends of justice. The court must look at the substance and not the form (*M.C. Mehta* v. *Union of India*, A 1987 SC 1086).

Defences-plea of alternative Remedy

No. 15— Petition for like Relief against Proceedings before a Tribunal

1. The petitioner company is owner of a shoe factory.

2. Respondent No.3 was employed in the petitioner's factory as Assistant Manager on salary of Rs.2,500/- per mensem besides Rs.1000/- per mensem as dearness allowance under a contract which provided for termination of service by three months' notice or emoluments or damages in lieu thereof on either side.

3. The petitioner on November 2, 1993 terminated the services of Respondent No.3 by a notice and simultaneously paid him a sum of Rs.10,500/- which was equivalent to his emoluments for three months.

4. Respondent No.3 was later instigated by some politicians inimically disposed towards the petitioner to approach the State Government (Respondent No.1) and those politicians also persuaded the State Government to make a reference of the case of termination of services of respondent No.3 as an industrial dispute to the Labour Court, Respondent No.2. A true copy of Government notification dated March 15, 1994 under section 10 read with section 2A of the Industrial Disputes Act, 1947 ("the Act") is Annexure 1 to this petition. No particulars of the said enmity or of the said politicians are being given as no relief is being claimed on the basis of "malice in fact".

5. In pursuance of the said reference the Labour Court registered a case No.3 of 1994, issued notice to the petitioner, whereupon the petitioner raised a preliminary objection before the Labour Court contending that the reference was void as Respondent No.3 was not a workman within the meaning of the Act. A true copy of the written objection is Annexure 2 to the petition.

The existence of alternative remedy is not a complete bar and does not oust the jurisdiction of the court to the entertainment of the writ petition. It is a self imposed rule (*B.D.A. Ltd.* v. *State of U.P.*, A 1995 All 277 DB). The bar of alternaive remedy does not apply where the impugned order is without jurisdiction or against the principles of natural justice (*Amar Singh* v. *State*, A 1995 Raj 151). The plea of alternative remedy is entertained by the courts as a rule of prudence and not as a rule of law. In cases where a person has understandably a strong case and his rights are so grossly violated that conscience is shaken, a court shall fail in its duty if it

6. The Labour Court on June 20, 1994 overruled the objection by an order, a true copy of which is Annexure 3 to the petition, holding that the Labour Court was not competent to examine the validity of the order of the Government and called upon the petitioner to justify the order of termination of service of Respondent No.3 by adding evidence on merits.

7. The petitioner contends that the proceedings before Respondent No.2 are without jurisdiction, and that the petitioner has a right not to be put to unnecessary harassment and expense in attempting to satisfy the Labour Court that the petitioner was justified in terminating the service of Respondent No.3.

8. The petitioner gave notice to the State Government (Respondent No.1) on May 15, 1994 demanding withdrawal or cancellation of its illegal order of reference, but to no avail. A copy of the notice is Annexure 4 to this petition.

9. The petitioner has no alternative and efficacious remedy except to approach this Hon'ble Court under Article 226 of the Constitution and hereby does so on the following:

Grounds

(a) Because the authority of the State Government to make an order of reference under section 10 of the Act is confined to a case involving a "workman" as defined in section 2 (s) thereof. Respondent No.2 being employed in a managerial capacity and being also in receipt of emoluments exceeding Rs.600/- per month could not be treated as a workman. Thus the necessary condition precedent for exercise of the power of the State Government did not exist, and the order was thus without jurisdiction and void *ab initio.*

(b) Because the Labour Court has committed a manifest error in taking the view that it cannot examine the validity of the order of reference.

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shall deny the remedy on the ground of alternative remedy available (*Sundararaju* v. *State Bank of India*, 1995 (II) MLJ 426 Mad).

Where alternative remedy which is adquate and equally efficacious is available, writ petition under Article 226 is not maintainable (*Commercial Credit Corp.* v. *V. Commissioner Madras Corporation*, A 1996 Mad 93 DB).

It had inherent power to examine the validity of the order of reference on which its own jurisdiction depended.

(c) Because the continuance of the said proceedings amounts to a restriction unauthorised by law, on the petitioner's fundamental right to carry on his business.

Prayer

(1) A Writ of Prohibition against Respondents No.2 prohibiting it from continuing further with the proceedings in Case No.3 of 1994.

(ii) A Writ of Certiorari calling for the bringing up of the records of the said case and quashing order dated June 20, 1994 Annexure 3.

(iii) A Writ in the nature of Mandamus, Order or Direction, directing the State Government, Respondent No.1, to desist from acting further on its Notification dated March 15, 1994 Annexure 1 and to treat it as *non est*.

(iv) Costs against Respondents Nos.1 and 3.

PART IV
ELECTION PETITIONS

ELECTION PETITIONS (a)

IN THE HON'BLE HIGH COURT OF JUDICATURE
AT ALLAHABAD

Election Petition No. **of 200**

Sri Khuda Baksh, son of Mohd. Baksh,
resident of Phulpur, Etawah .....*Petitioner*

Versus

1. Sri Rameshwar Nath,
   M.L.A., *mohalla* Barahi Tola, Etawah.
2. Sri A (with particulars)
3. Sri B "
4. Sri C "
5. Sri D " .....*Respondents*

Election petition, under section 80-A, 81 of the Representation of the Peoples Act, 1951, challenging the election of Sri Rameshwar Nath to the U. P. Legislative Assembly, from the single member Etawah, Constituency No.150, result of which was declared on.....

The above named petitioner, most respectfully submits as under :

(a) *Presentation :* An election petition has to be presented to the High Court by any candidate at the election or by an elector. 'Elector' means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

While being presented, the petition should be accompanied by as many copies thereof as there are respondents impleaded in the petition [section 81 (3)]. Every such copy must be attested by the petitioner under his own signature to be a true copy of the petition.

The provision has been held to be mandatory in *Sharifuddin Abdul Gani Lone*, A 1980 SC 303, (1980) 1 SCC 403, following which it has been held in *Ved Prakash* v. *Sukhan Lal*, A 1984 Del 276 that even a Photostat copy not attested to be a "true copy" is not enough; and in *Gopal Pd.* v. *Archana Kuwar*, A 1984 Del

1. That the petitioner was a candidate on behalf of the Congress Party in the last General Election for the U.P. Legislative Assembly from the single member Etawah Assembly Constituency No.150 and Sri Rameshwar Nath respondent No.1 who was declared elected was a Janta Party candidate. Four other candidates viz. Sarvasri A, B,C, and D also contested the said election.

2. That the polling for the said Etawah Assembly constituency No. 150, was held on.....and the counting took place on.....

280, that filing of copies subsequent to expiry of limitation (45 days) could not cure the earlier omission.

Since provisions of Civil Procedure Code apply to the trial of an election petition, O. 6, R. 16, 17 are applicable to the proceedings relating to the trial of an election petition subject to the provisions of the Act.

If the court on examination of the election petition finds that it does not disclose any cause of action it would be justified in striking out the pleadings. O. 6, R. 16, itself empowers the Court to strike out pleadings at any stage of the proceedings which may even be before the filing of the written statement by the respondent or commencement of the trial. If the Court is satisfied that the election petition does not make out any cause of action and that the trial would prejudice, embarass and delay the proceedings, the court need not wait for the filing of the written statement instead it can proceed to hear the preliminary objection and strike out the pleadings (*Dhartipakar* v. *Rajiv Gandhi*, A 1987 SC 1577 at page 1584; overruled *Vidya Charan Shukla* v. *G.P. Tripathi*, A 1963 MP 356)

Only parts of election petition which contain allegations of corrupt practice and have not been pleaded in Form 25, read with Rule 94-A and section 83 (1) of the Representation of Peoples Act, 1951 can be struck off. Other separate issues can be adjudicated on merits (*Shipra* v. *Shanti Lal Khoiwal*, A 1996 SC 1691).

Allegations of corrupt practice are in the nature of criminal charges, it is necessary that there should be no vagueness in the allegations so that the returned candidate may know the case he has to meet. If the allegations are vague and general and the particulars of corrupt practice are not stated in the pleadings, the tiral of the election petition cannot proceed for want of cause of action. The emphasis of law is to aviod a fishing and roving inquiry. It is therefore necessary for the Court to scrutinise the pleadings relating to corrupt practice in a strict manner (*Dhartipakar* v. *Rajiv Gandhi*, A 1987 SC 1577; *F.A.Sapa* v. *Singola*, A 1991 SC 1557).

It is true that the charge of corrupt practice under section 123 is treated akin to a charge in a criminal trial. The trial of an election petition is like a trial in the criminal case and the burden to prove corrupt practice is on the petitioner. But when the petitioner has adduced evidence to prove that the returned candidate had committed corrupt practice, the burden shifts on the returned candidate to rebut the

3. That on the last mentioned date the result of the said election was declared by the Returning Officer, and Respondent No.1 was declared to be elected to the U.P. Legislative Assembly from the aforesaid Constituency by a margin of 755 votes against the petitioner. The details of the votes secured by each candidate are given as under :

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evidence (*R. Puthunamar Alhithan* v. *P.H. Pandian*, A 1996 SC 1599). The Court insists upon a strict proof of such allegation of corrupt practice, and does not decide the case on preponderance or probabilities (*S. Baldev Singh Mann* v. *S.Gurucharan Singh*, A 1996 SC 1109).

As regards allegation of corrupt practice relating to use of vehicle, the three essentials as required by section 125 (3) of the Representation of People Act 1951 must be pleaded (*Dhartipakar* v. *Rajiv Gandhi*, A 1987 SC 1577 at p. 1593).

Where election petition is based on corrupt practice alleged to be perpetrated by the successful candidate, the facts constituting corrupt practice must be alleged in the petition (*Ram Charan* v. *Bhola Shankar*, A 1987 All 134). The material facts and full particulars of corrupt practice must be given in the petition, on failure the election petition is liable to be dismissed (*Subhash Desai* v. *Sharad J. Rao*, A 1994 SC 2277; *Onawal Islam* v. *S.K. Kanta*, A 1994 SC 1733, *F.A. Sapa* v. *Singora*, (1991) 3 SCC 375, A 1991 SC 1557; *Azhar Hussain* v. *Rajiv Gandhi*, A 1986 SC 1253, (1986) 2 SCR 782, 1986 All LJ 625; *K.C.Madhava Kurup* v. *K. Muraleedharan*, A 1991 Ker 20).

In order to constitute corrupt practice it must be shown that the act was done during the election compaign between the date when the returned candidate became a 'candidate' and the date of poll, and that it was the act of the candidate or his agent or any other person with his consent. Unless all these constituent parts of the corrupt practice are pleaded to constitute the cause of action raising a triable issue and are then proved by evidence, the corrupt practice cannot be held to be pleaded and proved. A mere display of the video cassette does not prove all the constituent parts of the corrupt practice (*Manohar Joshi* v. *Nitin Bhaurao Patil*, (1996) 1 SCC 169 at 194). For law on booth capturing- see *S.Baldev Singh Mann* v. *S. Gurucharan Singh*, A 1996 SC 1109.

The word 'Hindutva' by itself does not invariably mean Hindu religion and it is the context and the manner of its use which is material for deciding the meaning of the word 'Hindutva' in a particular text. It cannot be held that in the abstract the mere word 'Hindutva' by itself invaribly must mean Hindu religion. The so-called plank of the political party may at best be relevant only for appreciation of the context in which a speech was made by a leader of the political party during the election campaign, but no more for the purpose of pleading corrupt practice in the election petition against a particular candidate (*Manohar Joshi* v. *Nitin Bhaurao Patil*, (1996) 1 SCC 169 at 198). The principles as governing challenge to election and setting aside are the same. The onus to prove that on account of breach of the statutory provisions, the result of the election has been materially affected is on the

	Votes
(1) Sri Rameshwas Nath (Janta Party)	12,043
(2) Sri Khuda Baksh (Congress)	11,288
(3) Sri A (Muslim Majlis)	9,966
(4) Sri B (C.P.M.)	1,113

election petitioner. An election is not to be set aside on the "*ipse dixit*" of the witnesses (*Pan Bai* v. *Imarat Singh*, 1995 MPLJ 950 (MP).

The concept of "proper party" is alien to the election disputes, only contesting candidates are necessary party to an election petition, other persons are neither necessary nor proper parties to an election petition (*Iqbal Singh* v. *Avtar Singh*, A 1993 P & H 314).

Where the only question involved in the petition is whether the rejection of the nomination papers of the petitioner is legal and proper, the Returning Officer and the District Election Officer are not necessary parties, the only persons mentioned in section 82 of the Representation of People Act, 1951 are to be arrayed as parties (*Subhan Knan* v. *J.H.Patel*, A 1996 Kant 167; A 1991 SCW 772 followed).

In view of the provisons of section 82 of the Act, all the contesting candidates must be arrayed as parties to the writ petition. Where all such contesting respondents have not been arrayed as parties, the petition is liable to be dismissed, defect cannot be removed by resorting to the provisions of O. 1, R. 10 or O.6, R. 17, by impleading the necessary parties (*Kallappa Laxman Malabade* v. *Prakash Kallappa Awade*, A 1996 Bom 5).

The code of Civil Procedure being applicable to the trial of election petitons, an allegation made in the petition not specifically denied shall be deemed to have been admitted (*Ram Singh* v. *Col. Ram Singh*, A 1986 SC 3). The question of appreciation of evidence is not to be pleaded, instead it is the duty of the court to consider whether the documents produced by the parties prove the facts in issue (*Birad Mal Singhvi* v. *Anand Purohit*, A 1988 SC 1796 (para 12).

Limitation : Under section 81, limitation for a petition is 45 days from the date of the election of the returned candidate or if there are more than one candidate returned at the election and the dates of their elections are different, the later of those dates. It should be noted that an election petition cannot be filed before the date of the election of the returned candidate. Where the Courts are closed due to vacations, the election petition may be filed on the opening day by invoking the provisions of section 10 of the General Clause Act, though section 5 of the Limitation does not apply to election petitions (*Simhadri Satya Narayan Rao* v. *M. Buda Prasad*, 1991 (I) SCJ 281 (SC); *Manohar Joshi* v. *N.P. Patil*, A 1996 SC 796).

Defence : Points usually raised in defence are of two kinds, technical and substantial. Defects of a formal nature like non-joinder, improper framing of petition, absence of particulars, wrong verification, non-complaince with the requirements of security or presentation, limitation, wrong presentation, absence of proper

4. The election of the respondent No.1 Sri Rameshwar Nath to the U.P. Legislative Assembly from the single Member Etawah Assembly Constituency No.150 is void, inter alia, on the following :

Grounds

(a) Because respondent No.1 was, on the date of his nomination, disqualified to be chosen a member of the Legislative Assembly, under section 9-A of the Representation of the People Act, 1951 as he had a share as well as interest in a subsisting contract with the government of Uttar Pradesh in the name of Anandkar Printing Press, Etawah, and its parent firm Anandkar Karyalay Limited, Etawaah, for the publication of Electoral Rolls and other papers connected with the General Election. His nomination was thus improperly accepted, and the acceptance materially affected the result of the election in so far as it concerned the respondent.

(b) Because the said respondent himself and with his consent his agents and workers published statement of facts which were false and which were believed to be false or were not believed to be true in relation to the personal character and conduct of the petitioner as well as in relation to his candidature. The statements are contained in a fortnightly magazine known as 'Etawah Samacshar' and election bulletins headed 'Vigyapti' issued recently for this election. These statements were reasonably calculated to prejudice the prospects of the petitioner's election.

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affidavit, non attestation or inaccuracy of copies etc., are defence of a technical nature. While in a civil suit mere technical irregularities or omissions on the part of a plaintiff may be condoned they are not normally condoned in an election petition, for (i) the Courts are wary of disturbing the verdict of the electorate, (ii) the right to challenge an election is a statutory right and not a common law right, (iii) allegations of corrupt practice are in the nature of quasi-criminal charges and are strictly construed. Because of these considerations the pleader for the petitioner has to be extra careful in ensuring that all statutory provisions are strictly complied with. Substantial defence will consist of denial of the corrupt practices alleged and explanation of the allegations of fact. As an election petition can be maintained only on one or more grounds mentioned in sections 100 and 101 an attempt is made in the written statement to show that such grounds do not exist or that the allegations made in the petition are insufficient to make out such grounds.

Recrimination (section 97) : If one of the prayer in the petition is a declaration that any candidate other than the returned candidate has been duly elected, the returned candidate or any other party to the petition may file a recrimination

The respondent thereby committed the corrupt practice mentioned in section 123 (4) of the Act. The particulars of this corrupt practice are given in Schedule 1 annexed hereto.

(c) Because the said respondent himself and with his consent his agents and workers made an appeal to the Hindu electors to vote for the respondent on grounds of race, community and religion and to refrain from voting for the petitioner on the ground of his being a Muslim. They described him a Pakistani and published and propagated statements which had the effect of promoting or attempting to promote feelings of enmity or hatred between different classes of citizens of India, on the ground of religion and community. They were made to excite the religious sentiments of the voters against the petitioner. These publications and statements were calculated to prejudice the prospects of your petitioner's election and to further the prospects of the respondent's election. The respondents thereby committed the corrupt practice mentioned in section

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and lead evidence in support of it to prove that the election of the candidate sought to be declared elected would have been void if he had been returned. In other words, the claim that any other candidate may be declared elected can be defeated on all available grounds as if that candidate had been a returned candidate and a petition had been presented challenging his election. No recrimination is permitted unless the returned candidate or any other party who wants to make it, has within 14 days from the date of comencement of the trial given notice to the court of his intention to recriminate and has also given security as required by section 117 of the Act. The grounds of recrimination are usually stated in a document which is ordinarily known as petition of recrimination and has to be drafted and verified like an election petition, of course, with suitable changes. The right to recriminate is a special right and arises only when a declaration is claimed about any particular candidate having been elected. The right is not there if no such claim has been made. A recriminatory petition becomes unnecessary and need not be heard if the petitioner in the election petition withdraws his prayer for a declaration that he or any other candidate has been duly elected.

To a recrimination notice under section 97 of the Representation of People Act, the provisions of section 5 of the Limitation Act, 1963 are not applicable (*Anwari Basavaraj Patil* v. *Siddaramaiah*, (1993) 1 JT (SC) 328, A 1993 SCW 3950.

An appeal against an order under section 98 and 99 made by the High Court in an election petition lies to the Supreme Court under section 116-A of the Act and is to be heard as an appeal from the original decree. It has to be preferred within 30 days from the date of the order appealed from. The Supreme Court, for sufficient cause may entertain an appeal even after the expiry of the prescribed period.

123 (3A) of the Act. Details of such false and malicious statements and the manner in which they were propagated are set out in Schedule 1 and 2 hereto annexed, which form part of this petition.

(d) Because the said respondents far exceeded the prescribed maximum limit of the election expenses, and thereby committed the corrupt practice laid in section 123 (6) of the said Act as he failed to keep separate and correct account of all expenditure incurred by him in connection with the election and that the election account, i.e., election returns lodged by the respondents are false in material respects, vide details given in Schedule 3 annexed hereto.

(e) Because the said respondent himself and with his consent his agents and workers hired and procured vehicles for the conveyance of the electors to the polling stations and back to their places and thereby the respondents committed the corrupt practice specified in section 123 (5) of the said Act. Details of the polling stations to which electors were so carried is given in Schedule 4 annexed hereto.

(f) Because the said respondent himself and with his consent his agents procured the assistance of Government Officials to further the prospects of his election. He appointed a large number of such persons as polling agents and took their help in canvassing and influencing the voters. The names of such Government Officials are set out in Schedule 5 annexed hereto.

(g) Because 499 valid votes cast in favour of the petitioner had been wrongly declared to be invalid by the Returning Officer while 270 invalid votes were wrongly declared by the Returning Officer to be valid votes in favour of the said respondent. The details of the ballot papers and the polling stations at which they were casts are set out respectively in Schedules 6 and 7 annexed hereto.

Prayer

Wherefore it is respectfully prayed that :

(i) It be declared that the election of respondent No. 1 is void;

(ii) It be declared that the petitioner has been duly elected.

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